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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PETER SUGAR, DAVID D. WARNER and JAFFE, SNIDER, RAITT & HEUER, Professional Corporation,
Petitioners,

v.

DIAMOND MORTGAGE CORPORATION OF ILLINOIS AND A.J. OBIE & ASSOCIATES, INC., Debtors-in-Possession,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Petitioners, Michigan lawyers, provided prepetition services to respondents, Illinois corporations and Chapter 11 debtors. Respondents sued petitioners and others in Illinois for money damages on state-law theories, asserting subject matter jurisdiction (not in dispute here) under §1334(b) (bankruptcy) and §1332(a)(1) (diversity). The district court dismissed for lack of personal jurisdiction, finding B.R. 7004(d) (nationwide service of process) inapplicable and minimum contacts lacking. The Seventh Circuit reversed.

I.

Can a federal court use B.R. 7004(d) to acquire personal jurisdiction over non-creditor defendants in debtors' "related to" state-law suit when:

A. The scope of the bankruptcy rules is limited to "procedure in cases under title 11," but the suit does not arise under title 11?

B. B.R. 7004(d) applies only to adversary proceedings, but the suit is not an adversary proceeding?

II.

Does due process require, in a "related to" state-law suit, that a federal court using B.R. 7004(d) to acquire personal jurisdiction over non-creditor defendants address defendants' claim that they have not purposefully availed themselves of the privilege of doing business under the *state* laws invoked?

III.

Did the circuit court err in overturning the district court's finding that petitioners' contacts with the forum had no relationship to the causes of action pled sufficient to justify the assertion of personal jurisdiction pursuant to the Illinois long-arm statute?

LIST OF PARTIES

The parties to the proceedings below were:

1. The respondents, Diamond Mortgage Corporation of Illinois and A.J. Obie & Associates, Inc., Debtors-in-Possession, who were plaintiffs-appellants in the Seventh Circuit (hereafter referred to collectively as "the Diamond debtors");

2. The petitioners, Peter Sugar, David D. Warner, Jaffe, Snider, Raitt & Heuer, Professional Corporation,[1] who were defendants-appellees in the Seventh Circuit (hereafter referred to collectively as "the Jaffe attorneys"), and

3. Ronald M. Barron, Ronald M. Barron and Associates, P.C., Barron, Linden & Fagan, P.C., and Ronald M. Barron, P.C.,[2] who also were defendants-appellees in the Seventh Circuit.

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[1]Petitioner Jaffe, Snider, Raitt & Heuer, Professional Corporation, has no parent companies or subsidiaries to list pursuant to Rule 29.1.

[2]Petitioners believe the Barron entities will be filing their own petition for certiorari.

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DIAMOND MORTGAGE CORPORATION OF ILLINOIS and **A.J. OBIE & ASSOCIATES, INC.**, Debtors-in-Possession,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Jaffe attorneys respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on September 21, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, reported at 913 F.2d 1233, is reprinted in the appendix following this petition (1a-28a).

The report and recommendation of Magistrate James T. Balog, the minute order of the United States District Court for the Northern District of Illinois (Ann Claire Williams, Judge) adopting it, Judge Williams' opinion from the bench denying the Diamond debtors' motion for reconsideration and clarification and her judgment order of dismissal, all unreported, are reprinted in the appendix (29a-42a).

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§1334(b) and 1332(a)(1), the Diamond debtors brought this suit in the Northern District of Illinois. On July 19, 1989, the district court adopted the report and recommendation of a magistrate to whom the issue had been referred (29a-36a), and dismissed the suit for lack of personal jurisdiction (37a, 42a).

On the Diamond debtors' appeals, the Seventh Circuit on September 21, 1990, entered an opinion and judgment reversing the district court's orders and remanding for further proceedings (1a-28a). The Jaffe attorneys' timely motion for rehearing was denied on November 21, 1990 (43a).

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES AND COURT RULES INVOLVED

Sections 1334(b) and 2075 of Title 28 of the United States Code are reproduced in the appendix (49a). Bankruptcy Rules 7001 and 7004(d) are reproduced in the appendix (50a).

STATEMENT OF THE CASE

The Diamond debtors' complaint alleges that the Jaffe attorneys committed legal malpractice and breached fiduciary duties in Illinois by failing to advise the Diamond debtors properly (Complaint, R1, at ¶23(f)) regarding the Diamond debtors' own fundamentally unsafe and unsound business practices. The Diamond debtors admit practices that amounted to out-and-out fraud, a "ponzi" scheme (*id.* at ¶19b), but claim that the Jaffe attorneys should have realized what their clients were doing and told them to stop their illegal practices.

The complaint also alleges that the Diamond debtors, while doing business in Illinois, "engaged in transactions" with certain Michigan corporations "while" the Jaffe attorneys represented both the Diamond debtors and the Michigan corporations (*id.* at ¶16).

The Diamond debtors do not allege that the Jaffe attorneys provided any legal services in connection with the transactions between the Michigan and Illinois corporations. The complaint merely asserts that the Jaffe attorneys "knew or should have known" (*id.* at ¶18) that their Michigan clients engaged in "numerous unsafe, unsound and imprudent practices" (*id.*) but "failed to disclose" (*id.* at ¶20) this information to the Diamond debtors.

The Diamond debtors' complaint leveled similar charges against another Michigan attorney, Ronald M. Barron, and his various law firms (32a at n.1). The Barron firms were the Diamond debtors' general counsel; the Jaffe attorneys were special counsel.

The Diamond debtors' claim against the Jaffe attorneys is governed entirely by state law. The circuit court recognized that the claim did not "arise under" title 11 (8a), but was "related to [the Diamond debtors'] underlying bankruptcy cases" (9a-10a).[3] The court found that it was no longer clear after the Bankruptcy Reform Act of 1978 that the bankruptcy rules did not apply in "related to" cases (10a-11a). The court believed the claim could be characterized as an "adversary proceeding," specifically "'a proceeding . . . to recover money or property'" (14a). Because "Bankruptcy Rule 7004(d) applies to all 'adversary proceedings'" (15a) and because the court believed that the existence of "bankruptcy subject matter jurisdiction" (10a) (not in issue here) entailed the existence of "federal question jurisdiction" (19a), it concluded (20a) that

> whether there exist sufficient minimum contacts between the attorneys and the State of Illinois has no bearing upon whether the United States may exercise its power over the attorneys pursuant to its federal question jurisdiction. Certainly, the attorneys have sufficient contacts with the

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[3]District courts have subject matter jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §1334(b). It is the last category that is involved here.

United States to be subject to the district court's *in personam* jurisdiction.

The district court, because it had concluded that the Diamond debtors could not rely upon B.R. 7004(d) to effect service of process in Michigan (38a), did not reach the Jaffe attorneys' alternate argument that that rule could not constitutionally be applied to defendants lacking sufficient contacts with Illinois.

Although, as the circuit court noted (20a), it might have stopped after finding B.R. 7004(d) applicable, it went on to consider personal jurisdiction in the diversity context and reversed the district court's conclusion that the Jaffe attorneys (and the Barron firms) lacked sufficient contacts with Illinois to support jurisdiction (20a-26a).

The circuit court focused primarily on the Diamond debtors' pleading allegations, but the district court had relied upon an extensive factual record (including *all* of the Jaffe attorneys' files and the transcript of the deposition of Peter Sugar, one of the individually-named Jaffe attorneys). Based on this record, the district court accepted its magistrate's recommendation (29a-36a) and concluded there was no relationship between the Jaffe attorneys' contacts with Illinois and the claim asserted in the complaint (37a).

On November 21, 1990, the circuit court denied the Jaffe attorneys' petition for rehearing and en banc suggestion (43a). It did, however, grant a stay of the mandate on November 30 (45a).

REASONS FOR GRANTING THE WRIT

I.

THE CIRCUIT COURT'S TREATMENT OF A STATE-LAW "RELATED TO" DISPUTE AS AN "ADVERSARY PROCEEDING" AND ITS CONSEQUENT APPLICATION OF BANKRUPTCY RULE 7004(d) TYPIFIES THE WIDESPREAD CONFUSION CONCERNING THE APPLICATION OF THE BANKRUPTCY RULES.

The circuit court's holding that the bankruptcy rules apply to actions merely "related to" cases under title 11 has implications far beyond this case and will cause procedural problems in those areas in which bankruptcy practice and federal practice conflict. It is difficult to imagine a more important conflict than the question of personal jurisdiction presented by this case. Confusion of personal jurisdiction with subject matter jurisdiction is all too common and is compounded by the widespread failure to understand what is and is not an "adversary proceeding," a term defined by a rule of this Court. The line of cases beginning with *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and continuing through *Granfinanciera, S.A.* v. *Nordberg*, 109 S.Ct. 2782 (1989), has not prevented a fundamental and widespread misunderstanding of how and when the bankruptcy rules promulgated by this Court apply.[4]

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[4]Section I(B)(4) of the Reasons for Granting the Writ, *infra* at 15-17, demonstrates the scope of the problem.

A. B.R. 7004(d) cannot be used to assert personal jurisdiction over defendants in a "related to" case.

1. None of the bankruptcy rules govern procedure in a "related to" case.

The Diamond debtors invoked the district court's bankruptcy subject matter jurisdiction under 28 U.S.C. §1334(b) because they happen to be bankruptcy debtors and this action "is related to their underlying bankruptcy cases" (9a-10a).[5] However, it does not follow that the proceeding is governed by the bankruptcy rules rather than the federal rules of civil procedure.

The stated scope of the bankruptcy rules is to "govern procedure in cases *under* title 11." B.R. 1001 (emphasis added). They are "applicable to cases and proceedings under title 11, whether before the district judges or the bankruptcy judges of the district." Advisory Committee Note - 1987 Amendment to B.R. 1001. The Diamond debtors' state-law malpractice claim does not arise under the Bankruptcy Code, 11 U.S.C. §§101-1330, and existed (if at all) prior to the bankruptcy filing, under state law, completely independent of title 11.

> As the legislative history of 28 U.S.C. §1334(b) elaborated,
>
> The phrase "arising under" has a well defined and broad meaning in the jurisdiction context. By a grant of jurisdiction over all proceedings arising under title 11, the

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[5]The chief jurisdictional innovation of the Bankruptcy Reform Act of 1978 was to enable a single forum, the federal court in which the petition was filed, to adjudicate all claims "having a significant connection with bankruptcy" without the delay and expense of the disputes over *subject matter jurisdiction* that arose Hydra-headed under the Bankruptcy Act of 1898 (hereafter the "Old Act"). H.R. Rep. No. 95-595, pp. 45-48 (1977), S. Rep. No. 95-595, p. 17 (1978).

> bankruptcy courts will be able to hear any matter under which a claim is made under a provision of title 11.

H.R. Rep. No. 95-598, p. 445 (1977).[6] The phrase "proceedings . . . related to cases under title 11" in §1334(b), however, refers to those proceedings within the court's expanded bankruptcy jurisdiction based on claims *not* arising in or under title 11. "Related to" was not a term of art when the Bankruptcy Reform Act was hammered out, since "related to" suits encompass those "plenary" suits over which (absent consent) a district court simply could not have exercised jurisdiction prior to enactment of the Bankruptcy Reform Act. *See* Note, *Selective Exercise of Jurisdiction in Bankruptcy-Related Civil Proceedings*, 59 Tex. L. Rev. 325, 328-29 (1981).[7]

"Related to" proceedings are not governed by the bankruptcy rules, whose scope is explicitly and narrowly limited to governing procedure in "cases and proceedings under title 11." In "related to" proceedings, which are litigated and adjudicated without the need to so much as glance at a single passage of title 11, the bankruptcy rules have no application or relevance.

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[6] In the wake of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 ("BAFJA"), references to "bankruptcy courts" in the legislative history now mean district courts exercising bankruptcy jurisdiction (*see* 13a).

[7] The emergency interim jurisdictional rule, adopted by all district courts in 1982 while awaiting congressional response to *Marathon*, defined "related proceedings" as

> those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by an estate against parties who have not filed claims against the estate.

Interim Rule (d)(3)(A), *reproduced in White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 266 (6th Cir. 1983).

The rules that govern procedure in the Diamond debtors' "related to" malpractice action against the Jaffe attorneys are therefore the federal rules of civil procedure.[8] The district court's

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[8]Fed. R. Civ. P. 81(a)(1) states that the federal rules of civil procedure "do not apply to proceedings in bankruptcy . . . except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States." As the circuit court noted (10a), when Rule 81(a)1 was promulgated, the phrase "proceedings in bankruptcy" referred only to summary matters, not to plenary "related" matters. As part of the Bankruptcy Reform Act, references to bankruptcy and bankruptcy proceedings in other statutes were replaced with references to title 11 and cases under title 11, manifesting a clear congressional intent that as of November 6, 1978, "proceedings in bankruptcy" would mean "cases under title 11." The federal rules of civil procedure, however, are not part of the U.S. Code. The Advisory Committee on Civil Rules needs to recommend the corrective wording to the Standing Committee on Rules of Practice and Procedure, which would then make a proposal to the Judicial Conference, which, in turn, would recommend to this Court, pursuant to 28 U.S.C. §331, that it transmit to Congress the necessary adjustment to the language of Rule 81(a)(1).

But the failure to adjust Rule 81(a)(1) does not mean, as the circuit court claimed (11a), that

> [i]t is simply unclear, within the context of our present bankruptcy system, whether the term "proceedings in bankruptcy" should be interpreted to include all bankruptcy matters or only those directly based upon the Bankruptcy Code.

Quite the contrary, the Advisory Committee on Bankruptcy Rules in 1987 stressed,

> Rule 81(a)(1) F.R.Civ.P. provides that the civil rules do not apply to proceedings in bankruptcy, except as they may be made by applicable by rules promulgated by the Supreme Court, *e.g.*, Part VII of these rules. This amended Bankruptcy Rule 1001 makes the Bankruptcy Rules applicable to cases and proceedings under title 11, whether before the district judges or the bankruptcy judges of the district.

Thus, the only proceedings in federal district courts that are *not* governed by the federal rules of civil procedure are "cases and proceedings under title 11." The federal rules of civil procedure govern proceedings in federal court that are "related to" cases under title 11, just as state court rules govern "related to" proceedings pursued in state courts.

ability to acquire personal jurisdiction over the Jaffe attorneys is governed by Rule 4(e) and not by B.R. 7004(d).

2. Congress has not authorized nationwide service of process over defendants in a "related to" proceeding.

The legislative history of the Bankruptcy Reform Act contains no hint that Congress ever contemplated authorizing nationwide service of process over defendants in the "related to" actions over which it was extending the umbrella of bankruptcy subject matter jurisdiction for the first time.[9]

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[9]Many courts have misconstrued a passage of the legislative history relating to 28 U.S.C. §1334(b) ("The adjunct bankruptcy courts will exercise in personam jurisdiction as well as in rem jurisdiction in order that they may handle everything that arises in a bankruptcy case." S. Rep. No. 95-598, p. 153 (1978); H.R. Rep. No. 98-598, p. 445 (1977)) as authorizing personal jurisdiction in "related to" actions without regard for minimum contacts with the forum. *E.g.*, *In re Trim-Lean Meat Products, Inc.*, 11 Bankr. 1010, 1012 (D. Del. 1981) (reading B.R. 704 unnecessarily broadly: "On its face it authorizes national service of process . . . in all actions in the bankruptcy courts."); *In re First Hartford Corp.*, 63 Bankr. 479, 486 (Bankr. S.D.N.Y. 1986) ("A *Marathon*-type lawsuit brought by a debtor is a 'federal question' matter for jurisdictional purposes such that the test of minimum contacts with the state [citations omitted] need not be met because of Congress' authorization of nationwide service of process"); *In re Fleet*, 53 Bankr. 833, 836 (Bankr. E.D. Pa. 1985) (applying B.R. 704 to state-law consumer fraud action); *In re Schack Glass Indus. Co., Inc.*, 20 Bankr 967 (Bankr. S.D.N.Y. 1982) (applying B.R. 704(f) in breach of contract action); *In re G. Weeks Securities, Inc.*, 3 Bankr. 215, 219 (Bankr. W.D. Tenn. 1980) (applying B.R. 704(f)(1) in breach of contract action because Congress intended "to grant bankruptcy courts both *in personam* and *in rem* jurisdiction to decide controversies arising from or relating to bankruptcy cases").

The meaning of this passage, however, is clear from its context. Proceedings that "arose in a bankruptcy case" in 1978 (as today) were "summary" proceedings, such as turnover actions, which were always in rem, and "plenary" avoidance actions by the trustee, such as suits for the recovery of preferences,

(continued...)

This Court recently reiterated its view that a court may not exercise extraterritorial personal jurisdiction over a defendant "[a]bsent consent [or] authorization for service of summons." *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 494 U.S. 97, 104 (1987). The Court noted that "Congress knows how to authorize nationwide service of process when it wants to provide for it" and that lack of congressional authorization "argues forcefully that such authorization was not its intention." *Id.* 106. Congress did not authorize nationwide service of process in a "related to" case; Congress merely authorized bankruptcy rule-making for cases *under* title 11.

The scope of rule-making authority granted by Congress in 28 U.S.C. §2075 is limited to "practice and procedure in cases under title 11." The stated scope of the bankruptcy rules thus mirrors the congressional grant and is accordingly limited to "procedure in cases under title 11." B.R. 1001. This Court has no authority under 28 U.S.C. §2075 to prescribe rules governing procedure in "related to" cases. Such cases must be governed by the federal rules of civil procedure, promulgated pursuant to congressional authorization under 28 U.S.C. §2072, which renders ineffective and unenforceable all laws in conflict with the federal rules of civil procedure. Thus §2075 cannot be construed to authorize a rule that would conflict with the federal rules *except* "in cases under title 11." Since "related to" cases are clearly not "cases under title 11," this Court could not prescribe a rule for nationwide service of process in "related to" cases that conflicted with Fed. R. Civ. P. 4.

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[9](...continued)
which were in personam. Mussman & Riesenfeld, *Jurisdiction in Bankruptcy*, 13 Law & Contemp. Probs. 88, 93 (1948). This oft-cited passage makes no reference to the "plenary" garden-variety tort and contract actions that were merely "related to" bankruptcy cases and beyond the pale of bankruptcy subject matter jurisdiction before the 1978 reforms.

B. Bankruptcy Rule 7004(d) cannot provide a basis for personal jurisdiction over parties defending against a state-law claim that is not an "adversary proceeding."

1. Part VII of the bankruptcy rules applies only in "adversary proceedings."

Bankruptcy Rule 7004(d) is also inapplicable because it is found in Part VII of the bankruptcy rules, captioned "Adversary Proceedings." Bankruptcy Rule 7001, captioned "Scope of Rules of Part VII," begins with the announcement, "[a]n adversary proceeding is governed by the rules of this Part VII," and sets forth an inclusive list of the 10 types of proceedings that are "adversary proceedings." The Part VII rules were prescribed to govern only "the procedural aspects of litigation" in the enumerated "adversary proceedings." Advisory Committee Note to B.R. 7001.

The term "adversary proceeding" is found nowhere in title 11 or the jurisdictional provisions of title 28. "Adversary proceedings" are defined only in B.R. 7001 which, like its predecessor B.R. 701, was promulgated by this Court pursuant to congressional authorization under 28 U.S.C. §2075. Thus, nationwide service of process under B.R. 7004(d) is available exclusively in those proceedings enumerated in B.R. 7001.[10] Unless the Diamond debtors' malpractice suit qualifies as an adversary proceeding, B.R. 7004(d) is inapplicable.

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[10]Some of the Part VII rules, including B.R. 7004, are also to be applied in circumstances not relevant here. *See* B.R. 1018, 3007, 9014.

2. Although the Diamond debtors' tort claim is property of the estate, litigation of that claim is not an "adversary proceeding."

The circuit court characterized the Diamond debtors' malpractice suit as "an 'adversary proceeding' within the literal terms of Rule 7001" and specifically as a B.R. 7001(1) adversary proceeding (14a). According to the literal terms of 7001(1), however, such an adversary proceeding is a proceeding "to recover money or property" (irrelevant exceptions omitted). A 7001(1) adversary proceeding is brought to *re*cover money or property that was transferred by the debtor pre-petition or that is otherwise missing from the inventory of the estate at the commencement of the bankruptcy case. What is recoverable is money or property that 'belonged' to the pre-petition estate -- whether through actual or constructive possession by the trustee or on the basis of the ability to retrieve it by exercise of a title 11 power.

The legislative history of §541 of title 11 makes explicit, as did §70a(6) of the Old Act, that property belonging to the estate includes causes of action that the debtor could have brought before the commencement of the bankruptcy case. H.R. Rep. No. 95-598, p. 367 (1977). The Diamond debtors' cause of action against the Jaffe attorneys is unquestionably already property of the estate. 11 USC §541(a)(1). There is obviously no need for a 7001(1) adversary proceeding to "recover" it.[10]

The Diamond debtors do not seek to recover money or property that belonged to the estate; rather, their tort suit seeks a judgment for damages. The "substantial losses" (14a) that the Diamond debtors seek were never property of the estate. *In re Axton*, 641 F.2d 1262, 1273 (9th Cir. 1981) (claim for damages for

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[10]If, for example, sometime before the bankruptcy filing, the Diamond entities had assigned this cause of action to another, the Diamond debtors may have been able to institute an adversary proceeding to recover it for the estate.

alleged negligence is not a dispute over property of debtor) (dictum); *Hollywood Nat'l Bank* v. *Bumb*, 409 F.2d 23, 25 (9th Cir. 1969) (distinguishing action for damages for breach of contract from action to recover "specific property or fund which was once part of the bankrupt estate"). The mere fact of bankruptcy gives the Diamond debtors no greater rights in pursuit of their tort claim against the Jaffe attorneys than they would have had absent bankruptcy.[11]

3. Neither Congress nor this Court has changed the definition of "adversary proceedings" to include "related to" actions.

Nothing in the legislative history of the Bankruptcy Reform Act of 1978 supports the notion that by granting subject matter jurisdiction over "related to" state-law proceedings, Congress somehow intended that this Court's time-honored definition of "adversary proceedings" be transmogrified *sub silentio* to include "related to" suits. Instead, the legislative history indicates that the distinction between "adversary proceedings" and "related to" actions was unaffected by the fact that §1334(b) became the source of subject matter jurisdiction over both types of litigation. *See* S. Rep. No. 95-598, pp. 153-54 (1978).[12] Nor has this Court ever sig-

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[11]As the legislative history makes clear, §541(a)(1) "is not intended to expand the debtor's rights against others more than they exist at the commencement of the case." H.R. Rep. No. 95-598, p. 367 (1977). So, for example, if the Diamond debtors had assigned this cause of action, the assignee could not have used B.R. 7004(d) to obtain personal jurisdiction over the Jaffe attorneys.

[12]Before the 1978 reform, federal courts had no bankruptcy subject matter jurisdiction over "related to" proceedings, *i.e.*, those "plenary" suits for which §23(b) of the Old Act made no exception. It was thus inconceivable that such a "related to" proceeding could be considered an adversary proceeding, or that a

(continued...)

naled a redefinition of "adversary proceedings" in its B.R. 7001(1) to embrace "related to" actions.

Unlike tort suits, adversary proceedings "to recover money or property" involve exercise of the trustee's avoidance and turnover powers. The Advisory Committee Note to B.R. 7001 makes clear that 7001(1) proceedings are "[t]hose proceedings [that] were classified as adversary proceedings under former Bankruptcy Rule 701," *i.e.*, "those brought to avoid transfers by the debtor under §§544, 545, 547, 548 and 549 of the Code; subject to important exceptions, proceedings to recover money or property." This case does not involve such proceedings.

Bankruptcy Rule 701, the predecessor of B.R. 7001, was promulgated in 1973 pursuant to rule-making authority given by Congress to this Court in 28 U.S.C. §2075. A 701(1) adversary proceeding was one to "recover money or property" (with some of the same exceptions as in 7001(1)). The '700' rules were not replaced by the '7000' rules until 1983. As the Advisory Committee explained in its Preface to the 1983 Rules, "[t]he concept of adversary proceedings is continued in Part VII of the proposed rules" (with some changes, none of which affect 7001(1) or 7004(d)).

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[12](...continued)
bankruptcy rule applicable only to adversary proceedings could be used to assert nationwide jurisdiction over a defendant in a "related to" action.

The mutual exclusivity of 7001(1) "adversary proceedings" and "related to" actions, *i.e.*, what were formerly "plenary" actions not involving title 11 powers, is further highlighted by the Advisory Committee Note to B.R. 701:

> The rules in Part VII (701 to 782 inclusive) govern the procedural aspects of most of the litigation within the jurisdiction of the court of bankruptcy. ***The procedure in plenary actions or proceedings, on the other hand, is governed by the Federal Rules of Civil Procedure when brought in United States district courts*** and by applicable state rules of civil procedure when brought in state court. (emphasis added)

Since an adversary proceeding "to recover money or property" has the same meaning today that it had before the rules were revised in 1983, the 7001(1) proceedings in which 7004(d) can presently be used to assert nationwide personal jurisdiction are the same as the 701(1) proceedings in which 704(f)(1)[13] could be used to assert personal jurisdiction before 1983. Similarly, the 701(1) proceedings in which 704(f) could be used after the Bankruptcy Reform Act of 1978 are the same proceedings in which 704(f)(1) could be used under the Old Act. The enlargement of bankruptcy subject matter jurisdiction -- in 28 U.S.C. §1471(b) in 1978 and its 1984 carbon-copy successor §1334(b) -- thus had absolutely no impact on the meaning of "a proceeding . . . to recover money or property" in 701(1) and its 1983 successor 7001(1). Therefore, the Diamond debtors' malpractice action is not an "adversary proceeding" in which B.R. 7004(d) can be used to assert personal jurisdiction over the Jaffe attorneys.

4. Misuse of this Court's definition of "adversary proceedings" has led to the erroneous application of B.R. 7004(d) to effect personal jurisdiction over defendants in "related to" actions.

What makes a particular proceeding an "adversary proceeding" is not the colloquially 'adversarial' nature of the dispute nor the fact that the debtor and defendant are adversaries. An "adversary proceeding" involves a debtor and an "adverse claimant," *i.e.*, a party asserting ownership interests in assets allegedly belonging to the debtor's estate. Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 Harv. L. Rev. 703, 712 n.49 (1982); Ferguson, *The Consensual Basis of Subject-Matter Jurisdiction in Matters of*

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[13]Former Bankruptcy Rule 704(f)(1) provided that "[t]he summons, together with the complaint and notice of trial, and all other process except a subpoena may be served anywhere within the United States."

Bankruptcy: Fact and Fiction, 14 Rutgers L. Rev. 491, 492 (1960) ("Adverse party is, however a term of technical significance; not all merely opposing parties are adverse parties.").

Before 1978, an "adversary proceeding" simply could not be confused with an ordinary tort or contract "plenary" suit. Nowadays, however, a panoply of purely state-law tort and contract claims pursued by debtors (or others!) seeking compensatory, contract, or even *punitive* damages are often blithely referred to as "adversary proceedings." Misuse of this Court's "adversary proceeding" designation -- without discussion, support, or opposition -- is approaching epidemic proportions.[14] This Court should put a halt to the havoc being wrought by lower courts' mischaracterization of "related to" suits as "adversary proceedings" and

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[14]Examples of mischaracterization are legion. One commentator has even referred to the "related to" causes of action asserted by the debtor in this Court's *Marathon* decision as an "adversary proceeding," Galligan, *Article III and The "Related To" Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 Univ. of Puget Sound L. Rev. 1, 4 (1987), although the phrase "adversary proceeding" appears nowhere in *Marathon*. Colliers, the best-known treatise in the area, also has fallen into the trap: "Proceedings within Rule 7001(1) include actions by trustees or debtors . . . to obtain a money judgment based on breach of contract or tortious injury to the debtor." 9 Collier on Bankruptcy ¶7001.04, at 7001-7 (15th ed. 1989). No support for this statement is given. As a description of B.R. 7001(1), it is incorrect. As a reflection of misuse of B.R. 7001(1) in case law, it is unfortunately accurate. The previous edition makes no such error regarding B.R. 701(1). 13 Collier on Bankruptcy ¶701.04 (14th ed. 1977).

Random examples include: *In re P.D.S. Devel. Corp.*, 103 Bankr. 93 (Bankr. S.D.N.Y. 1989) (action between non-debtors characterized as 7001(1) "adversary proceeding" found not "related to" bankruptcy case and dismissed); *In re Earle Indus., Inc.*, 72 Bankr. 131, 132 (Bankr. E.D. Pa. 1987) ("adversary proceeding . . . seeking damages for defendant's alleged breach of contract"); *In re Allied Mechanical & Plumbing Corp.*, 62 Bankr. 873, 876-77 (Bankr. S.D.N.Y. 1986) (referring to debtor's "related to" state-law breach of contract dispute as "adversary proceeding" but abstaining under §1334(c)(2)). *See also* n.16 *infra*, for examples of cases in which B.R. 7004(d) is implicated.

consequent misapplication of the bankruptcy rules, notably B.R. 7004(d), to state-law suits.[15]

II.
APPLICATION OF THE NATIONWIDE SERVICE OF PROCESS PROVISION IN A "RELATED TO" CASE IS UNCONSTITUTIONAL ABSENT A FINDING THAT DEFENDANTS PURPOSEFULLY AVAILED THEMSELVES OF THE PRIVILEGE OF DOING BUSINESS UNDER THE STATE LAWS INVOKED.

A. Extending personal jurisdiction to garden-variety negligence litigation due to the happenstance of a bankruptcy filing would impermissibly subject the Jaffe attorneys to the burdens of litigation in a foreign forum in violation of their constitutional due process rights.

Even if nationwide service of process were available here, it could not be used without addressing the Jaffe attorneys' due

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[15] *E.g.*, *In re WWG Indus., Inc.*, 44 Bankr. 287 (N.D. Ga. 1984) (non-debtor assignee of state-law action allowed to use 7004(d)); *Foreman Indus., Inc.* v. *General Motors Corp.*, 34 Bankr. 712, 720 (S.D. Ohio 1983) (using 704(f)(1) in "related to" "adversary proceeding" by debtor and creditor seeking compensatory and punitive damages in contract and tort claims); *In re Sonnyco Coal, Inc.*, 89 Bankr. 658 (Bankr. S.D. Ohio 1988) (using 7004(d) in "related to" "adversary proceeding" seeking compensatory and punitive damages in contract and conspiracy action); *In re GEX Kentucky, Inc.*, 85 Bankr. 431 (Bankr. N.D. Ohio 1987) ("related to" trespass and conversion actions seeking compensatory and punitive damages characterized as "adversary proceeding" and 7004(d) applied); *In re First Hartford Corp.*, 63 Bankr. 479 (Bankr. S.D.N.Y. 1986) (using 7004 in "related to" "adversary proceeding" for breach of contract and breach of warranty); *In re McCrae Fire Protection, Inc.*, 49 Bankr. 773 (Bankr. E.D. Mich. 1985) (allowing non-debtor defendant to use 7004(d) against third-party defendants in Florida-law breach of construction contracts action characterized as "adversary proceeding arising under title 11").

process rights. As this Court recently reiterated in reviewing "the prerequisites to a federal court's exercise of in personam jurisdiction" in a federal question case (Commodities Exchange Act), "[t]he requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause.... It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Omni Capital*, 484 U.S. at 104 (quoting *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).[16]

Consistent with this Court's more recent personal jurisdiction decisions,[17] in which strict notions of sovereignty were downplayed, other courts have re-examined their previous decisions upholding nationwide service of process provisions merely because the sovereign asserting jurisdiction was the United States. *E.g.*, *Burstein* v. *State Bar of California*, 693 F.2d 511 (5th Cir. 1982); *Paulson Inv. Co. Inc.* v. *Norbay Securities, Inc.*, 603 F. Supp. 615 (D. Or. 1984); *Cannon* v. *Gardner-Martin Asphalt Corp.*, 699 F. Supp. 265 (M.D. Fla. 1988); *Smith* v. *Pittsburgh National Bank*, 674 F. Supp. 542 (W.D. Va. 1987); *see also Oxford First Corp.* v. *PNC Liquidating Corp.*, 372 F. Supp. 191, 201-03 (E.D. Pa. 1974). These federal question cases suggest that the Fifth Amendment requires a court to assess whether it can properly assert personal jurisdiction over a defendant *even where the defendant has contacts with the United States and where the rule of decision is provided*

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[16] *See Fraley* v. *Chesapeake and Ohio Railway Co.*, 397 F.2d 1, 3 (3d Cir. 1968) (quoting *Lone Star Packaging Car Co.* v. *Baltimore & Ohio R.R.*, 212 F.2d 147, 155 (5th Cir. 1954) ("'[T]he question of whether [claims arising under federal law] are to be tried in one locality or another is now to be tested . . . simply by basic principles of fairness'")). *See also Chem Lab Products, Inc.* v. *Stepanek*, 554 F.2d 371 (9th Cir. 1977).

[17] *See, e.g., Asahi Metal Indus. Co.* v. *Superior Court of Cal.*, 480 U.S. 102 (1987); *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985); *Insurance Corp. of Ireland*, 465 U.S. 495 (1982).

by federal law.[18] *A fortiori*, such an analysis is necessary where the rule of decision is provided by state law.

B. The circuit court analyzed this case as if all "related to" cases are federal question cases; they are not.

The circuit court relied upon its prior decisions upholding the assertion of personal jurisdiction in cases involving federal question subject matter jurisdiction and, without examination, mechanically restated the proposition that nationwide service of process provisions satisfy Fifth Amendment due process concerns (even where, as here, all rules of decision are provided by state law, not federal) whenever a defendant had contacts with the United States (20a). In doing so, the circuit court erred.

The assertion of jurisdiction over all persons who have contacts with the United States may not be justified -- even where a federal court is applying a federal rule of decision -- merely because of those contacts. Perhaps more importantly here, this is not a federal question case. At a minimum, the circuit court erred when it assumed that the grant of subject matter jurisdiction to district courts over matters "related to" bankruptcy cases in and of itself converts these matters into "federal question" cases.[19]

Congress has enacted a number of statutes, 28 U.S.C. §§1330-65, that specify the kinds of civil cases over which district courts

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[18]This Court has twice noted that it has had "'no occasion to consider the constitutional issues'" raised by the theory that "a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits." *Omni Capital*, 484 U.S. at 103 n.5 (quoting *Asahi Metal*, 480 U.S. at 113). This case may present that occasion.

[19]The court found, *e.g.*, that "section 1334 provides federal question jurisdiction" (19a).

may exercise subject matter jurisdiction. Only §1331 should properly be called "federal question" jurisdiction.[20] That section gives district courts original, but not exclusive, jurisdiction over all civil cases arising under the Constitution, treaties or laws of the United States. The Diamond debtors do not (and could not) assert jurisdiction under §1331. The circuit court nevertheless referred to the Diamond debtors' assertion of jurisdiction under §1334 as if it were an invocation of federal question jurisdiction (*e.g.* 19a).

The district court would not have jurisdiction over the Diamond debtors' state law malpractice claim under §1331. The claim not only does not arise under title 11, it does not arise under *any* provision of the Constitution, treaties or laws of the United States. No federal rule of decision is implicated whatsoever. The circuit court therefore erred when it analyzed the Jaffe attorneys' due process arguments as if this were a federal question case.

The circuit court cited its prior decision in *Lisak* v. *Mercantile Bancorp, Inc.*, 834 F.2d 668 (1987). *Lisak*, however, expressly says that a "federal court in a federal question case is not implementing any state's policy; it exercises the power of the United States." *Id.* at 671. Obviously, if the district court proceeds to address the Diamond debtors' state law malpractice claim, it will be implementing state law policy.

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[20]As Senator Hatch noted, "State tort or contract cases in which one party happens to be bankrupt are still State law claims. They are not Federal questions." Statement by the Hon. Orrin G. Hatch, a Ranking Member of the Sen. Comm. on the Judiciary and a Sen. Conferee on H.R. 5174, Upon Consideration of the Conf. Report on that Bill. 130 Cong. Rec. S58,891 (June 29, 1984).

C. "Related to" cases more closely resemble diversity cases; the same analysis that led the district court to dismiss the case for lack of personal jurisdiction applies.

The same reasoning that led the district court to conclude that, viewed as a diversity case, personal jurisdiction was absent here, also applies to the analysis of personal jurisdiction when the matter is viewed as a "related to" bankruptcy case. In both situations, federal courts must resolve disputes in which all rules of decision are provided by state law. In both instances, federal courts effectively sit as state courts.

The district court, wearing its diversity hat, agreed with the magistrate that personal jurisdiction was lacking and adopted the magistrate's findings that the Diamond debtors had "simply failed to make even a *prima facie* showing that the conduct of the various defendants on their visits to or other contacts with Illinois is the conduct on which plaintiffs base their claim" (5a). The court applied well-established principles that a federal court, sitting in diversity, may not exercise personal jurisdiction over a defendant unless the defendant has purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *See Sher* v. *Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990) (citing *Burger King*, 471 U.S. at 475). The district court found that it could not assert personal jurisdiction over the Jaffe attorneys consistent with these due process considerations. A similar analysis should be made even if subject matter jurisdiction over a "related to" suit is based on §1334(b).

For reasons discussed below, the district court correctly concluded that the Jaffe attorneys' contacts with the forum were not related to the causes of action pled; at a minimum the court did not commit clear error in reaching that conclusion. Accordingly, unless some additional element exists that would permit a different due process analysis here -- *i.e.*, unless the due process analysis to be

applied when jurisdiction is based on §1334(b) differs from that under §1332 -- personal jurisdiction is lacking.

This point can perhaps best be exemplified by assuming that the Diamond debtors had filed a diversity action against the Jaffe attorneys, that such a lawsuit had been dismissed for lack of personal jurisdiction, and that the Diamond debtors had *then* filed for bankruptcy. Could the simple change in the Diamond debtors' status to debtors alter the due process analysis?

In this hypothetical -- which is not analytically different in any significant respect from the case at hand -- the district court would have already determined that the usual requisites of due process analysis, *i.e.*, reasonable anticipation of litigation and inconvenience to the defendant, were lacking. Only some overriding governmental interest, such as judicial economy, might justify a different conclusion. Such an interest ultimately would need to be grounded on the powers given to Congress pursuant to the bankruptcy clause, Article I, §8, cl. 4, of the United States Constitution.

This Court has rejected analogous attempts to derogate other constitutional rights on the basis of the bankruptcy clause. In *Marathon*, this Court rejected an argument that the bankruptcy clause carried with it the inherent power to establish legislative courts (as opposed to Article III courts) capable of adjudicating controversies that were merely "related to" a bankruptcy case. 458 U.S. at 72-74. The Court specifically noted that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the [state-law claim] at issue in this case." *Id.* at 71.

Similarly, in *Granfinanciera* v. *Nordberg*, 109 S.Ct. 2782 (1989), this Court rejected an attempt to "overcome the clear command of the Seventh Amendment" merely because a jury trial might "impede swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations." *Id.* at 2787.

Having rejected attempts to lessen the protections afforded by Article III and the Seventh Amendment, this Court should also summarily reject any notion that Fifth Amendment analysis of a "related to" proceeding is affected by the happenstance of a bankruptcy filing. If the district court correctly concluded that it could not assert personal jurisdiction over the Jaffe attorneys under §1332, the same conclusion was required for a "related to" proceeding under §1334(b); the circuit court concluded otherwise because it thought the Jaffe attorneys' contacts with the United States rendered further analysis unnecessary (19a-20a).

III.

THE CIRCUIT COURT ERRED IN OVERTURNING THE DISTRICT COURT'S FINDING THAT THE JAFFE ATTORNEYS' CONTACTS WITH THE FORUM HAD NO RELATIONSHIP TO THE CAUSES OF ACTION PLED SUFFICIENT TO JUSTIFY THE ASSERTION OF PERSONAL JURISDICTION PURSUANT TO THE ILLINOIS LONG-ARM STATUTE.

The circuit court erred in Part VII of its opinion by looking only to the Diamond debtors' allegations of minimum contacts and ignoring the district court's factual findings based on the broader record that was before it. In upholding the assertion of jurisdiction under the Illinois long-arm statute, the circuit court found a "nexus" between the Jaffe attorneys' acts in Illinois and the allegations of the complaint; the court therefore concluded that the assertion of jurisdiction comports with due process considerations. The court erred, however, by ignoring the factual record before the district court and by indiscriminately associating Sugar, Warner and the Jaffe Law Firm with other defendants.

A. The circuit court improperly substituted its views for those of the district court; absent a finding of clear error, the circuit court could not properly disturb the district court's factual finding that there was no relationship between the causes of action pled and the asserted jurisdictional acts.

The district court concluded that there was simply no nexus between the Jaffe attorneys' contacts with the State of Illinois and the claim asserted in the complaint, *i.e.*, the Jaffe attorneys' acts did not "give rise to" the Diamond debtors' claim. *John Walker & Sons, Ltd.* v. *DeMert & Dougherty, Inc.*, 821 F.2d 399, 402 (7th Cir. 1987) (quoting *Deluxe Ice Cream Co.* v. *RCH Tool Corp.*, 726 F.2d 1209, 1215 (7th Cir. 1984)). In the words of *NTN Bearing Corp.* v. *Charles E. Scott, Inc.*, 557 F. Supp. 1273, 1276 (N.D. Ill. 1983), there were not "sufficient affiliating circumstances" between the Jaffe attorneys' acts and the claim. Indeed, the district court accepted the report of its magistrate that the Diamond debtors had not even made "a *prima facie* showing that the conduct of the various defendants on their visits to or other contacts with Illinois is the conduct on which plaintiffs base their claim" (34a).

The circuit court could not properly ignore the factual findings of the district court. It could disturb the district court's finding of a lack of such contacts only if the district court committed clear error in reaching its conclusion. *Lads Trucking Co.* v. *Board of Trustees of the Western Conference of Teamsters Pension Fund*, 777 F.2d 1371, 1373 (9th Cir. 1985); *Appelt* v. *Whitty*, 286 F.2d 135 (7th Cir. 1961). The circuit court's *de novo* review of the conclusion of the district court was limited to "the application and interpretation of legal precepts." *Stranahan Gear Company, Inc.* v. *NL Industries, Inc.*, 800 F.2d 53, 56 (3d Cir. 1986); *Hunt Wesson Foods, Inc.* v. *Supreme Oil Co.*, 817 F.2d 75, 78 n.2 (9th Cir. 1987).

The district court's ultimate conclusion that there was no "nexus" here is a mixed question of law and fact subject to *de novo*

review. There is an intermediate step, however, between the strict factual findings of the district court and the legal conclusion that a "nexus" exists. In reviewing the facts here, the district court must first have examined whether there was *any relationship* between the asserted cause of action and the acts complained of. Only after determining what the relationship was -- as a matter of fact -- could the court determine the legal significance of that relationship. Here, the district court concluded -- as a matter of fact and logical inference -- that there was *no relationship* between the asserted cause of action and the acts complained of. The circuit court could not conclude that there was a nexus, then, absent a finding of clear error. "Where basic facts and facts permissibly inferred therefrom are found by the court sitting as a fact finder, *neither the basic facts nor the inferred facts* may be disturbed on review unless they are deemed clearly erroneous." *Universal Minerals, Inc.* v. *C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981) (citing *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1948)) (emphasis added). There could be no nexus, *i.e.*, no *legally significant* relationship, if there was no relationship at all.

The circuit court made no finding of clear error. It could not, therefore, disturb the district court's conclusion regarding the lack of personal jurisdiction in this case.

B. The district court's factual findings were based on a review of the record; the circuit court improperly reversed those findings by reciting the mere allegations of the complaint.

The circuit court's opinion states that the jurisdictional acts alleged in the Complaint "amount to a prima facie case". (22a). However, the circuit court ignored the fact that the magistrate and the district judge reviewed a substantial factual record, not simply bare allegations in a complaint. "The burden was [on the Diamond debtors] to establish the jurisdictional facts. The mere allegations of a complaint...are not enough to confer personal jurisdiction over

a non-resident defendant. Facts, not mere allegations, must be the touchstone." *Chem Lab Products*, 534 F.2d at 372 (citations omitted).[21]

The district court correctly found that there was no relationship between the Jaffe attorneys' contacts with Illinois and the allegations of the complaint. In any event, the district court certainly did not commit clear error in reaching this conclusion. *See Ten Mile Indus. Park* v. *Western Plains Service*, 810 F.2d 1518, 1524 (10th Cir. 1987); *Farmers Ins. Ex.* v. *Portage*, 907 F.2d 911, 912 (9th Cir. 1990).

The circuit court reviewed the district court's finding that the cause of action did not "arise from" jurisdictional acts without explaining whether it was making this review *de novo*. It then reversed these findings based on the allegations of the complaint.[22]

C. The district court correctly found that the Jaffe attorneys' contacts with Illinois were insufficient to sustain personal jurisdiction.

The circuit court itself referred to the Jaffe attorneys' contacts with Illinois as "sporadic" (21a). As the district court correctly

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[21]Here, the Diamond debtors had conducted extensive discovery via the bankruptcy proceedings, deposed numerous individuals (including Peter Sugar, the senior Jaffe attorney involved), and obtained *all* of the Jaffe attorneys' files before they filed the present suit. *See* n. 24 *infra*. The Diamond debtors had this entire record available to them in attempting to make a *prima facie* case that there was a relationship between the Jaffe attorneys' acts and the alleged cause of action. They failed.

[22]The circuit court also attributed the Barron attorneys' conduct to the Jaffe attorneys. It does not distinguish the relative level of involvement of these attorneys in Illinois. Rather, the court said, "*the attorneys* conducted business with, or provided legal advice to, [the Diamond debtors] in Illinois" (23a) (emphasis added).

found, these contacts do not provide the basis for valid *in personam* jurisdiction. Peter Sugar made only two trips to Illinois for the Diamond debtors; David Warner at most one. The Jaffe attorneys' invoices were sent to Michigan. The few letters sent by the Jaffe attorneys to Illinois were generally directed to state regulatory agencies, not to the Diamond debtors.[23] In sum, the district court correctly held that there was no nexus between the alleged jurisdiction-creating acts and the causes of action asserted.[24]

Even if it were true that the Jaffe attorneys *should* have realized, while performing services in Michigan, what their Michigan clients were doing, this hardly constitutes "fair warning that a particular activity may subject [them] to the jurisdiction" of the State of Illinois, *Burger King*, 471 U.S. at 472 (quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)); nor would a finding of personal jurisdiction from such facts be consistent with the "degree of predictability" required so that

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[23]*See* Exhibits to Plaintiffs' Consolidated Memorandum in Opposition to Defendants' Motions to Dismiss or Transfer, Nos. 10-14. Of the voluminous documents submitted by the Diamond debtors to the district court, only one (to a state agency) bears the signature of Warner; only seven bear the signature of Sugar, and of those, only two could even remotely be considered of a substantive nature. The balance involved a fee dispute between the Diamond debtors and other counsel or are simply enclosure letters.

[24]The circuit court also suggested that the Jaffe attorneys "had an obligation to disclose their conflict of interest when they transacted business or gave legal advice [to the Diamond debtors] in Illinois" (23a), but no conflict has even been properly alleged. The Diamond debtors have not alleged that the Jaffe attorneys ever provided any legal services in connection with transactions between the Diamond debtors and other persons represented by the Jaffe attorneys. The ethical restriction barring simultaneous representation "customarily extends to situations in which an attorney represents multiple clients in distinct and wholly unrelated matters, *provided their interests are adverse or potentially adverse in at least one of them. Conflicts of Interest in The Legal Profession*, 94 Harv. L. Rev. 1244, 1297 (1981) (emphasis added).

"potential defendants [can] structure their *primary conduct* with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472, quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980)) The assertion of jurisdiction here would thus also violate the "predictability" element of the due process test.

CONCLUSION

For all of these reasons, this petition for certiorari should be granted. The Jaffe attorneys stress that the third issue (personal jurisdiction in diversity) is presented because in the posture of this case, it is a necessary adjunct to the "thorny" questions (1a) raised by the first two issues (both concerning personal jurisdiction under the bankruptcy rules). There is no doubt that the bankruptcy questions were the focus of the circuit court's attention and should be examined closely by this Court. Only this Court can prevent widespread misapplication of its bankruptcy rules in "related to" proceedings. The court below obviously thought long and hard about its conclusions and still went wrong. To compound the problem, it erred again by applying a faulty due process analysis, looking to the Jaffe attorneys' contacts with the federal sovereign instead of with the forum whose substantive law applies. This case is an excellent vehicle for resolution of the confusion regarding the bankruptcy rules and "related to" state-law claims. The fact that the Diamond debtors began in district court presents these issues more cleanly, without the irrelevant distractions that might have clouded them if this case had begun in bankruptcy court. In short, the interlocutory stage of the proceedings is no handicap here. The

issues are sharply and clearly defined. This Court will need to resolve them sooner or later, and the Jaffe attorneys respectfully submit that the sooner, the better.

Respectfully submitted,

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December 21, 1990

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PETER SUGAR, DAVID D. WARNER and JAFFE, SNIDER, RAITT & HEUER, Professional Corporation,

Petitioners,

v.

DIAMOND MORTGAGE CORPORATION OF ILLINOIS, and **A.J. OBIE & ASSOCIATES, INC.**, Debtors-in-Possession,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPENDIX

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Opinion of the Court of Appeals
(September 21, 1990)

OPINION OF THE COURT OF APPEALS
(SEPTEMBER 21, 1990)

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 89-2804 & 89-3003

DIAMOND MORTGAGE CORPORATION OF ILLINOIS, Debtor-in-Possession and A.J. OBIE & ASSOCIATES, INCORPORATED, Debtor-in-Possession,

Plaintiffs-Appellants,

v.

PETER SUGAR, DAVID D. WARNER, JAFFE, SNIDER, RAITT & HEUER, P.C., RONALD M. BARRON, RONALD M. BARRON AND ASSOCIATES, P.C., BARRON & KNOPPOW, P.C., BARRON & LINDEN, P.C., BARRON, LINDEN & FAGAN, P.C., and RONALD M. BARRON, P.C.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 6822—Ann Claire Williams, *Judge.*

ARGUED JUNE 5, 1990—DECIDED SEPTEMBER 21, 1990

Before WOOD, JR., CUDAHY and POSNER, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Jurisdictional questions can be thorny, particularly when their resolution depends upon the application of different sets of procedural rules. The paramount question presented in this case is whether, in "non-core" bankruptcy proceedings involving disputed questions of state law, federal district courts should consult

the Bankruptcy Rules or state long-arm statutes in determining if they may exercise personal jurisdiction over defendants.

I.

Diamond Mortgage Corporation of Illinois ("Diamond"), a mortgage banker licensed and incorporated in Illinois, originated mortgage loans to Illinois borrowers. Diamond sold these loans to Illinois investors through its sister corporation, A.J. Obie & Associates, Inc. ("Obie"), which was also licensed and incorporated in Illinois. Diamond and Obie filed Chapter 11 bankruptcy petitions in August 1986, and their cases currently are pending before the United States Bankruptcy Court for the Northern District of Illinois. The combined total insolvency of Diamond and Obie is approximately $11.5 million.

From 1981 through 1986, two sets of attorneys represented Diamond and Obie at various times. The first set, the Barron Attorneys,[1] a Michigan attorney and five Michigan law firms of which he was the principal, served as general counsel for Diamond and Obie. The Barron Attorneys' responsibilities included drafting closing documents, reviewing questions of Illinois law, revising disclosure forms and examining offering circulars. To perform these duties, the Barron Attorneys traveled to Chicago, placed business phone calls and sent business letters to Diamond and Obie in Illinois. Similar duties were performed by the Jaffe Attorneys,[2] also citizens of Michigan, who served primarily as securities counsel for Diamond and Obie, and who reviewed, drafted and revised documents for them. The Jaffe Attorneys also traveled to Illinois, placed busi-

[1] The Barron Attorneys consist of Ronald M. Barron, Ronald M. Barron and Associates, P.C., Barron & Knoppow, P.C., Barron & Linden, P.C., Barron, Linden & Fagan, P.C. and Ronald M. Barron, P.C.

[2] The Jaffe Attorneys consist of Peter Sugar, David D. Warner and Jaffe, Snider, Raitt & Heuer, P.C.

ness phone calls and sent business letters to Diamond and Obie. Each set of attorneys characterizes its contacts with Illinois as minimal.

Diamond and Obie charge that the Barron Attorneys and the Jaffe Attorneys committed legal malpractice and breached their fiduciary duties in representing them in the following respects:

> (1) they simultaneously represented several corporations that were engaged in transactions with Diamond and Obie; (2) they failed properly to advise Diamond and Obie as to the conflict of interest created by that simultaneous representation; (3) they failed to withdraw from their conflicting representation when they should have done so; and (4) they failed properly to advise Diamond and Obie regarding Diamond's and Obie's fundamentally unsafe and unsound business practices.

Appellants' Brief at 10. The lower court never reached the substance of these claims, however. After Diamond and Obie leveled these charges in their complaint, the Barron and Jaffe Attorneys filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction. They claimed that they were neither citizens nor residents of Illinois and that the legal services they rendered had been performed in Michigan; thus, they asserted that the district court could not exercise its jurisdiction over their persons. Naturally, Diamond and Obie disagreed, maintaining that their former attorneys were amenable to nationwide service of process pursuant to Bankruptcy Rule 7004(d) and, in the alternative, that the attorneys had established sufficient minimum contacts with Illinois to justify the exercise of federal jurisdiction through the Illinois long-arm statute.

Pursuant to 28 U.S.C.A. section 636(b)(1) (West Supp. 1990), the district court referred the matter to Magistrate James T. Balog, who recommended that the suit be dismissed for lack of personal jurisdiction. Magistrate Balog reasoned that "the procedures prescribed in Part VII [of

the Bankruptcy Rules] apply only to adversary proceedings brought in a bankruptcy court. While the instant case may stem from a bankruptcy proceeding, it is a legal malpractice action brought in Federal district court. As such, [the nationwide service of process provision of] Bankruptcy Rule 7004(d) is inapplicable." Report & Recommendation at 2 (N.D. Ill. May 19, 1989). Further, he concluded that the Jaffe and Barron Attorneys had not established minimum contacts sufficient to justify the exercise of federal jurisdiction under the Illinois long-arm statute. Hence, he recommended that the district court grant the attorneys' motions to dismiss for lack of personal jurisdiction. The district court adopted the Report & Recommendation, conceding nonetheless that Diamond and Obie's position on nationwide service of process had "superficial logic." Order at 2 (N.D. Ill. July 19, 1989).

As a result of the district court's decision, Diamond and Obie filed a motion for reconsideration and clarification; they charged, among other things, that the district judge and magistrate had relied upon a superseded version of the Bankruptcy Rules (and cases decided under this version) to reach their conclusions. While acknowledging that the newly amended Bankruptcy Rules substantially undermined the magistrate's analysis, the district court denied the motion, reasoning that the Bankruptcy Rules—and particularly Rule 7004(d)—apply only to "core" proceedings under the Bankruptcy Code. Diamond and Obie filed a timely notice of appeal. Since we believe that the district court may exercise its jurisdiction over the Barron and Jaffe Attorneys' persons, we reverse and remand.

II.

Whether the Federal Rules of Civil Procedure or the Bankruptcy Rules should be applied in this proceeding is implicated, in large measure, by fundamental changes in the entire structure of the bankruptcy system. A brief review of these changes—which have occurred over the last century—is necessary before we turn to the problem immediately at hand.

The present bankruptcy structure is the culmination of substantial congressional amendment to the federal bankruptcy laws in response to recent Supreme Court decisions. Until 1978, federal district courts acted as bankruptcy courts, but often referred cases to "referees" (later designated "judges") who could issue final orders directly appealable to the district court. A referee's jurisdiction extended only as far as the district in which the district court was located. *See, e.g.*, 2A *Collier on Bankruptcy* ¶ 38.02 (14th ed. 1978).

Dissatisfaction with the dual role of bankruptcy referees—who wielded tremendous power to decide cases while retaining extensive supervisory responsibility to conduct the continuing administration of the bankruptcies—was, among other factors, the reason Congress embarked upon a comprehensive examination of the bankruptcy laws. G. Treister, J. Trost, L. Forman, K. Klee & R. Levin, *Fundamentals of Bankruptcy Law* § 1.01 (2d ed. 1988). At the conclusion of this study, Congress enacted the Bankruptcy Act of 1978, which eliminated the referee system and established, in its place, "in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district." 28 U.S.C. § 151(a) (Supp. II 1978). "Adjuncts" in name alone, these new bankruptcy courts operated virtually independent of the district courts. Despite their status as Article I judges, these bankruptcy judges were authorized by Congress to hear proceedings "arising under title 11 or *arising in or related to* cases under title 11." 28 U.S.C. § 1471(b), (c) (Supp. II 1978) (emphasis supplied). As such, they could hear claims based upon federal and state law.

The Bankruptcy Act of 1978, however, was short-lived; in 1982, the Supreme Court decided *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which the Court invalidated Congress's grant of jurisdiction to the bankruptcy courts. Justice Brennan, writing for a plurality of four Justices, concluded that the Bankruptcy Act's sweeping grant of jurisdiction to bank-

ruptcy judges (who served without Article III salary and tenure protections)—including the power to decide matters "related to those arising under the bankruptcy laws"—violated the provisions of Article III of the Constitution. *Marathon*, 458 U.S. at 76 (plurality). Further, a majority of the Court refused to confine its strictures to that portion of the jurisdictional grant that violated Article III—an approach that would have left the bankruptcy courts free to hear "core"[3] proceedings:

> [W]e cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes. See H.R. Rep. No. 95-595, pp. 43-48 (1977); S. Rep. No. 95-989, p. 17 (1978).

Marathon, 458 U.S. at 87 n.40 (plurality); *see id.* at 91-92 (Rehnquist, J., concurring) ("Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to bankruptcy courts under § 1471 . . . I concur in the judgment.").

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[3] Justice Brennan seems to have introduced the notion of "core" and "non-core" proceedings: "[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages . . . ." *Marathon*, 458 U.S. at 71 (plurality). Congress has since defined core proceedings, which can be described generally as those proceedings involving rights created directly by federal bankruptcy law, with great specificity. *See* 28 U.S.C.A. § 157(b)(2) (West Supp. 1990).

Congress responded slowly to *Marathon*, despite the Court's decision to stay its judgment twice. Finally, when the second stay expired six months after the Court announced its decision and Congress still had failed to act, federal district courts across the nation adopted almost identical versions of an Emergency Jurisdictional Rule (recommended by the Judicial Conference of the United States) as an interim measure to preserve the bankruptcy courts until Congress enacted remedial legislation. *See In re Wildman*, 30 B.R. 133, 138 (Bankr. N.D. Ill. 1983). Under the Emergency Jurisdictional Rule, Article III district judges exercised the entire scope of bankruptcy jurisdiction, but were authorized to refer most bankruptcy cases to bankruptcy judges for final resolution, subject to appeal. However, bankruptcy judges could not, without the parties' specific consent, render final decisions in "related proceedings" like that of the *Marathon* debtor who asserted an independent cause of action against a third party who was not a bankruptcy claimant. Further, district judges could withdraw their reference to the bankruptcy courts at any time.

Finally, in July 1984, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 ("BAFJA"), which, in many respects, codified the approach taken by the Judicial Conference in the Emergency Jurisdictional Rule. Again, jurisdiction would be exercised in the first instance by Article III district judges, who could then refer bankruptcy cases to bankruptcy courts. Bankruptcy courts, however, would not be independent of Article III courts; rather, they would serve as an arm of those courts. *See* 28 U.S.C.A. § 151 (West Supp. 1990) ("In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."). District judges could refer almost any matter to the bankruptcy courts, either by specific or blanket referral. *See* 28 U.S.C.A. § 157 (West Supp. 1990) (outlining procedures for referral); General Rule 2.33(a) of the United States District Court for the

Northern District of Illinois (providing blanket referral). Once the case was referred, the bankruptcy judge could enter final orders in core proceedings but, absent the parties' consent, could, in non-core proceedings, only make recommendations to the district judge, which would then be subject to *de novo* review by the district court. 28 U.S.C.A. § 157(c) (West Supp. 1990). As a practical matter, "the bankruptcy judge sits as a judge in core proceedings. In noncore proceedings, however, the bankruptcy judge functions as a magistrate or special master." 1 R. Ginsberg, *Bankruptcy* § 1.03[a] (2d ed. 1989). Still, *original* jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11," would rest with the district court. 28 U.S.C.A. § 1334(b) (West Supp. 1990).

III.

All of this background is irrelevant, however, if Diamond and Obie's claim does not invoke the district court's bankruptcy jurisdiction. Section 1334(b) of Title 28 provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." There is little question that Diamond and Obie's malpractice and breach of fiduciary duty suit does not arise under Title 11. The suit clearly does not satisfy the test for determining whether a suit is a core proceeding, arising under Title 11, as recently adopted by this circuit:

> "[A] proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case."

Barnett v. Stern, 1990 WL 108866, slip op. at 15 (7th Cir. Aug. 2, 1990) (quoting *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987)); *see also In re GEX Ky., Inc.*, 85 B.R. 431, 433 (Bankr. N.D. Ohio 1987) (explaining "arising under" jurisdiction).

The parties, however, dispute the extent to which the suit is related to Diamond and Obie's underlying bankruptcy cases. *See* Appellants' Brief at 15-16; Jaffe Attorneys' Brief at 13. We believe that this action is related to the underlying bankruptcy cases, for its resolution may have a direct and substantial impact on the asset pool available for distribution to the estates. *See Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989); *In re Xonics*, 813 F.2d 127, 131 (7th Cir. 1987) (both defining "related to" within the context of 28 U.S.C.A. § 157(c) (West Supp. 1990)); *cf. Barnett*, slip op. at 15; G. Treister, J. Trost, L. Forman, K. Klee & R. Levin, *Fundamentals of Bankruptcy Law* § 2.01(c)(2) (2d ed. 1988) (except at outer reaches, "there should be no legitimate question about the legislative intent to vest the court with a complete, or pervasive, jurisdiction over all matters that have to do with a bankruptcy case or that have any significant bearing upon it."). And despite the Barron and Jaffe Attorneys' repeated claims at oral argument that this was simply a diversity case, Diamond and Obie did base their claim, at least in part, on the district court's bankruptcy jurisdiction. *See* Complaint at ¶ 2 ("Jurisdiction is based upon 28 U.S.C. §§ 1332(a)(1) and 1334(b). This action is a non-core matter related to *In re Diamond Mortgage Corporation of Illinois*, No. 86 B 13066 and *In re A.J. Obie & Associates, Inc.*, No. 86 B 13067, both pending before the United States Bankruptcy Court for the Northern District of Illinois.").[4] We conclude, therefore, that Diamond and Obie's complaint is related to their

[4] We dismiss the Jaffe and Barron Attorneys' intimation at oral argument that Diamond and Obie's decision to base their suit on the district court's diversity jurisdiction—as well as on its Title 11 jurisdiction—somehow divested the district court of its ability to rely upon the service of process provisions of the Bankruptcy Rules. Surely, Diamond and Obie should not be penalized for their ability to ground their suit on two bases of jurisdiction instead of only one. It would be absurd to grant a court broader *in personam* powers because a party has eliminated one of its grounds of jurisdiction.

underlying bankruptcy cases, and that the district court could have exercised its bankruptcy subject matter jurisdiction over the claim.

IV.

Both the Bankruptcy Rules and the Federal Rules of Civil Procedure contain provisions regulating procedure in bankruptcy proceedings. While the procedures in these two sets of rules are, in many respects, similar, occasional differences arise. We turn now to the relationship between these rules in an effort to determine which set applies to this case.

A. The Relationship Between the Federal Rules of Civil Procedure and the Bankruptcy Rules

The Federal Rules of Civil Procedure "govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81." Fed. R. Civ. P. 1. Among these exceptions are bankruptcy proceedings: "These rules do not apply . . . to proceedings in bankruptcy . . . except in so far as they may be made applicable thereto by rules promulgated by Supreme Court of the United States." Fed. R. Civ. P. 81(a)(1). At first blush, this rule appears to suggest that the Federal Rules of Civil Procedure do not apply to bankruptcy-related proceedings, and that Diamond and Obie's claim—which is related to a bankruptcy case—is therefore not governed by these rules. Rule 81(a)(1), however, is not dispositive on this point: when Rule 81 was promulgated, the phrase "proceedings in bankruptcy" referred only to those matters arising *directly* from the substantive provisions of bankruptcy law (summary matters), not to related matters (plenary matters). *Windsor Communications Group, Inc. v. Grant*, 75 B.R. 713, 728-29 (E.D. Pa. 1985). At the time these civil rules were last amended, plenary matters could not be brought in federal district court unless some independent basis of jurisdic-

tion could be established, in which case the district court would apply its own Federal Rules of Civil Procedure. *See Chatz v. Freeman*, 204 F.2d 764 (7th Cir. 1953). Accordingly, these plenary matters were, by definition, not "proceedings in bankruptcy" under Rule 81. *Windsor Communications Group*, 75 B.R. at 729.

In the Bankruptcy Act of 1978, however, Congress eliminated the distinction between summary and plenary matters and established new bankruptcy courts exercising jurisdiction over all "civil proceedings arising under title 11 or arising in *or related to* cases under title 11." 28 U.S.C. § 1471(b) (Supp. II 1978) (emphasis supplied). Since that time, as we have discussed, district courts have been authorized to consider cases based upon federal bankruptcy law or claims related to such cases. Hence, while the term "proceedings in bankruptcy" within the context of Rule 81(a)(1) may have had great relevance within the bankruptcy system as it existed before 1978, the massive overhaul of this system substantially undermines any attempt to rely upon this term in resolving our question. *Windsor Communications Group*, 75 B.R. at 732; *see In re Merritt Logan, Inc.*, 109 B.R. 140, 145-46 (Bankr. E.D. Pa. 1990). It is simply unclear, within the context of our present bankruptcy system, whether the term "proceedings in bankruptcy" should be interpreted to include all bankruptcy matters or only those directly based upon the Bankruptcy Code.[5] To resolve this question, we must look elsewhere.

[5] Of course, the Barron and Jaffe Attorneys might argue that our construction of the term "proceedings in bankruptcy" (as used within the context of Federal Rule of Civil Procedure 81(a)(1)) should be confined to core proceedings, because these proceedings most closely resemble summary matters, as we explained above. Alternatively, Diamond and Obie might contend that Congress's decision not to amend the term "proceedings in bankruptcy"—in the wake of the massive overhaul of the bankruptcy system—reflects Congress's intent to preclude application of the Federal Rules of Civil Procedure to any "proceeding," whether core or

(Footnote continued on following page)

B. The Scope and Application of the Bankruptcy Rules: In Which Courts Do They Apply?

Bankruptcy Rule 1001 provides that the Bankruptcy Rules "govern procedure in cases under title 11 of the United States Code."[6] No reference here is made limiting application of the Bankruptcy Rules to bankruptcy courts; indeed, the Advisory Committee explained that "[t]his amended Bankruptcy Rule 1001 makes the Bankruptcy Rules applicable to cases and proceedings under title 11, whether before the district judges or the bankruptcy judges of the district." Bankruptcy Rule 1001 advisory committee's notes to 1987 amendment. *Cf. Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946) ("The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency. But in ascertaining their meaning the construction given to them by the Committee is of weight.").

Such an explanation—and the plain language of the Rule—lies in stark contrast to the previous version of Bankruptcy Rule 1001, which specifically limited application of the Bankruptcy Rules to the bankruptcy courts: "The Bankruptcy Rules and Forms govern procedure *in United States Bankruptcy Courts* in cases under chapters 7, 9, 11, and 13 of title 11 of the United States Code." Bankruptcy

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[5] *continued*
non-core. Both of these arguments seem to have at least some merit, but curiously, neither side has advanced them. In any event, we cannot rely upon outdated references to summary and plenary matters (in the wake of the 1978 Act, *Marathon*, the Emergency Jurisdictional Rule and BAFJA), nor can we accord substantial weight to Congress's failure to act, especially since the Supreme Court, not Congress, promulgates the Federal Rules of Civil Procedure.

[6] 28 U.S.C. section 2075 (1982) authorizes the Supreme Court "to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under Title 11."

Rule 1001 (1986) (emphasis supplied). The excision of the phrase "in United States Bankruptcy Courts" from the present version of the Bankruptcy Rules reflects the extension of the district courts' bankruptcy jurisdiction after the enactment of BAFJA. *See* Letter of Hon. Morey L. Sear, Chairman of the Advisory Committee on Bankruptcy Rules, to Hon. Edward T. Gignoux, Chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (reprinted in Bankruptcy Rules at 5 (Collier Pamphlet ed. 1989)) ("As a consequence of the 1984 Amendments to the Bankruptcy and Judicial Codes, it is necessary to amend the 1983 Bankruptcy Rules to provide rules of practice and procedure applicable to district judges when sitting in bankruptcy and to bankruptcy courts when exercising the district court's jurisdiction."). It is clear, therefore, that both the district courts and the bankruptcy courts may apply the Bankruptcy Rules in appropriate cases.

If a court determines that application of the Bankruptcy Rules is appropriate, it must determine the proper procedures to be followed in the case. Part VII of the Bankruptcy Rules provides the procedural rules for "adversary proceedings," which are defined, in part, as proceedings "to recover money or property. . . ." Bankruptcy Rule 7001.[7] This rule, like Bankruptcy Rule 1001, was amended in 1987 to comport with BAFJA's jurisdictional overhaul of the bankruptcy system. Prior to 1987, Rule 7001 described adversary proceedings as proceedings "*in a bankruptcy court* (1) to recover money or property. . . ." Bankruptcy Rule 7001 (1986) (emphasis supplied). The current version of Rule 7001 eliminated this requirement; the rules of Part VII, then, apply to all adversary proceedings, whether they transpire in bankruptcy or in district court.

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[7] These stand in contrast to "contested matters" that are resolved summarily. *See* Bankruptcy Rule 9014; *see also* 1 R. Ginsberg, *Bankruptcy* § 1.07[a] (2d ed. 1989).

There can be little question that Diamond and Obie's claim against the Barron and Jaffe Attorneys can be characterized as an "adversary proceeding" within the literal terms of Rule 7001. Diamond and Obie charge, essentially, that the Barron and Jaffe Attorneys' malpractice led to substantial losses and eventual bankruptcy. Presumably, Diamond and Obie now seek to recoup these losses. Such an action can be described as "a proceeding . . . to recover money or property. . . ." and does not fit any of the exceptions to Bankruptcy Rule 7001. The procedural rules of Part VII, therefore, apply to bankruptcy proceedings like this without regard to judicial forum.[8]

Despite this analysis, the Barron and Jaffe Attorneys maintain that, regardless of BAFJA and the amendments to the Bankruptcy Rules, district judges may not invoke the Bankruptcy Rules in their courts. They assert, first, that "the Bankruptcy Rules apply only to cases *commenced* in bankruptcy court." Jaffe Attorneys' Brief at 9. Indeed, they draw some support for this assertion from Magistrate Balog's Report & Recommendation, which concludes:

> Under Rule 7001, the procedures prescribed in Part VII apply only to adversary proceedings brought in a bankruptcy court. While the instant case may stem from a bankruptcy proceeding, it is a legal malpractice action brought in Federal district court. As such, Bankruptcy Rule 7004(d) is inapplicable.

Report & Recommendation at 2.

In reaching this conclusion, the magistrate may have relied upon a superceded version of Rule 7001, which, as we mentioned previously, expressly limited application of the Part VII procedural rules to proceedings transpiring "in a bankruptcy court." The present version of Rule 7001

[8] Of course, in reaching this conclusion, we assume for the moment that the Bankruptcy Rules apply to both "core" and "non-core" proceedings. We shall examine this assumption in a moment.

contains no such limitation. Further, the magistrate's conclusion ignores the jurisdictional upheaval created by *Marathon*, the Emergency Jurisdictional Rule and BAFJA: adopting the magistrate's frame of reference, litigants simply cannot "bring" a case in bankruptcy court, for bankruptcy judges do not exercise Article III authority. Instead, litigants must commence their cases in the district court, at which time that court may refer these cases to the bankruptcy court by specific or blanket referral. Bankruptcy judges, as mere "unit[s] of the district court[s]," simply do not exercise any original jurisdiction in the new bankruptcy scheme, 28 U.S.C.A. §§ 151, 1334 (West Supp. 1990); hence, a case cannot, by definition, be "commenced" in the bankruptcy court. *In re Adams*, 809 F.2d 1187, 1190 (5th Cir. 1987).

Still, the Barron and Jaffe Attorneys claim that the Bankruptcy Rules should not be applied at any time in district court, even if cases technically cannot be commenced in the bankruptcy court. They rely upon *Metro Communications, Inc. v. Baltimore Radio Show, Inc.*, 68 B.R. 9 (W.D. Pa. 1986), for the proposition that Bankruptcy Rule 7004(d)'s service of process provisions apply only to proceedings conducted in the bankruptcy court. They fail to note, however, that the district court decided *Metro Communications* under the Bankruptcy Rules *before* these rules were amended in 1987 to apply to bankruptcy proceedings in both the district and bankruptcy courts. These amendments were designed, in part, to correspond to the substantially revised bankruptcy system in the wake of *Marathon* and BAFJA: "[b]oth Rules 1001 and 9001 were amended to make clear that the Bankruptcy Rules, *not* the Federal Rules of Civil Procedure, apply when the district court hears an adversary proceeding." *In re Merritt Logan*, 109 B.R. at 145. In this light, we reaffirm our earlier conclusion that Bankruptcy Rule 7004(d) applies to all "adversary proceedings" (as defined by the Bankruptcy Rules) conducted in the bankruptcy courts or in the district courts. *See, e.g., Wieboldt Stores, Inc. v. Schot-*

tenstein, 94 B.R. 488, 497 (N.D. Ill. 1988).[9] And we agree with Judge Leinenweber's reasoning in a similar case:

> It would seem anomalous to limit nationwide service of process to only those adversary proceedings which are heard in the bankruptcy court. To do so would cause personal jurisdiction to hinge upon whether the district court has withdrawn its reference to the bankruptcy court. Such a limitation would give the plaintiff in an adversary case before a bankruptcy court a more extensive ability to serve defendants than a plaintiff in an identical adversary case before the district court. This result hardly seems justifiable.

Stavriotis v. Litwin, 1986 WL 12005 (N.D. Ill. Oct. 19, 1986).

V.

The logical culmination of this analysis is that Diamond and Obie may rely upon Bankruptcy Rule 7004(d), which provides that "[t]he summons and complaint and all other process except a subpoena may be served anywhere in the United States," in effecting service of process on the Barron and Jaffe Attorneys in Michigan. But the Barron and Jaffe Attorneys disagree, contending (in accord with the district court's opinion on reconsideration) that the

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[9] Indeed, it would seem illogical to suggest that the bankruptcy courts—whose jurisdiction was substantially curtailed by BAFJA—could exercise broader *in personam* jurisdiction than the district courts. Yet the Barron and Jaffe Attorneys' position leads precisely to that result: under that scheme, district courts could authorize service only within the bounds of the Federal Rules of Civil Procedure, while bankruptcy courts could authorize nationwide service pursuant to Rule 7004(d). This outcome—which allows the bankruptcy court broader powers than the district court—flies in the face of *Marathon* and BAFJA. Such a result would also effectively transform the bankruptcy courts into much more than "units" of the district court, presumably in violation of *Marathon*. *See* 28 U.S.C.A. § 151 (West Supp. 1990).

Bankruptcy Rules may not be applied to non-core proceedings commenced in district court.

The Barron and Jaffe Attorneys argue vigorously that non-core claimants (who advance state law claims) should not be allowed to rely upon the broad jurisdictional reach of the Bankruptcy Rules to establish *in personam* jurisdiction.[10] But nothing in the literal terms of the pertinent rules—and, in particular, nothing in Rules 1001,[11] 7001 or 7004(d)—even remotely suggests that they are to be applied differently in core and non-core proceedings. Indeed, the definition of adversary proceedings contained in Rule 7001 (applying to proceedings commenced "to recover money or property")—which seems broader than the illustrative definition of core proceedings contained in 28 U.S.C.A. section 157(b)(2) (West Supp. 1990)—suggests to us that the procedural rules contained in Part VII may be applied to non-core proceedings. We are not alone in reaching this conclusion. *See, e.g., In re GEX Ky., Inc.*, 85 B.R. 431, 434 (Bankr. N.D. Ohio 1987) ("Nowhere does Rule 7004 make a distinction among the classifications of adversary proceedings. Proceedings arising under, arising in or re-

[10] They also contend that Diamond and Obie's "fortuitous" filing of a bankruptcy petition before bringing state law claims should not extend the jurisdictional reach of the district court. Jaffe Attorneys' Brief at 8. Surely, this statement cuts too broadly: if, in fact, the attorneys' malpractice *led* to the insolvency, as Diamond and Obie claim, the filing of a bankruptcy petition can hardly be described as fortuitous. Moreover, even if the two actions were unrelated, any judgment against the Barron and Jaffe Attorneys might substantially augment the assets available for distribution to the estate. And it certainly is not unusual for the filing of a bankruptcy petition to alter substantially rights that may have previously existed. *See, e.g.*, 11 U.S.C.A. § 547(b) (1982 & West Supp. 1990) (discussing preferences).

[11] The Advisory Committee tells us only that Rule 1001 "makes the Bankruptcy Rules applicable to cases and proceedings under title 11, whether before the district judges or the bankruptcy judges of the district." Bankruptcy Rule 1001 advisory committee's notes to 1987 amendment.

lated to a case under Title 11, core and non-core, are all adversary proceedings that receive the same treatment under Rule 7004."); *In re Outlet Dep't Stores*, 82 B.R. 694, 698 (Bankr. S.D.N.Y. 1988) ("Rule 7004(d) is fully in keeping with 28 U.S.C. § 1334(b), which confers on the district courts original but not exclusive jurisdiction of all civil proceedings with a nexus to a bankruptcy case, be those proceedings core or non-core."); *see also In re Sonnyco Coal, Inc.*, 89 B.R. 658, 663-65, 669-70 (Bankr. S.D. Ohio 1988) (upholding nationwide service of process in non-core proceeding); *cf. Windsor Communications Group, Inc. v. Grant*, 75 B.R. 713, 731-33 (E.D. Pa. 1985) (advocating similar treatment of core and non-core proceedings before 1987 amendments).

Further, when the Bankruptcy Rules were amended in 1987—to comport with the new jurisdictional scheme created by *Marathon* and BAFJA—no changes were made relating to Rule 7004(d) to differentiate between core and non-core proceedings, despite the significance of this distinction within the newly-created jurisdictional scheme. *See In re GEX Ky.*, 85 B.R. at 434. And the promulgators of the Rules knew how to draw this distinction when they intended to do so. *See, e.g.*, Bankruptcy Rule 7012(b) (establishing specific procedure for non-core proceedings). Finally, it would seem anomalous for different sets of procedural rules to govern related proceedings in the same court, given the bankruptcy scheme's emphasis on centralization and efficiency. The creation of a dual procedural system would not be consistent with these goals, nor would it comport with Congress's intent to streamline the bankruptcy process. *Windsor Communications Group*, 75 B.R. at 732 ("[T]he establishment of a dual procedural system is undoubtedly in conflict with the intent of Congress to concentrate jurisdiction over all bankruptcy cases and all proceedings in a single court, as evidenced by the grant of pervasive jurisdiction to the district courts in BAFJA."). Consistent with these goals and the language of the rules, therefore, we hold that courts may apply Bankruptcy Rule 7004(d)—allowing nationwide service of process—in non-core, related proceedings.

VI.

Still, the Barron and Jaffe Attorneys urge that the district court cannot apply the nationwide service of process provisions of Bankruptcy Rule 7004(d) without violating their Fifth Amendment due process rights. As residents of Michigan, they claim that a district court sitting in Illinois lacks *in personam* jurisdiction over them because they do not have sufficient minimum contacts with the State of Illinois to trigger that state's long-arm statute. Ill. Ann. Stat. ch. 110, ¶ 2-209 (Smith-Hurd 1990).

Generally, a court's assertion of personal jurisdiction must comport with "traditional notions of fair play and substantial justice" if it is to satisfy the Due Process Clause of the Constitution. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see Burnham v. Superior Court of Cal.*, 110 S. Ct. 2105, 2110 (1990) (plurality). " '[T]he constitutional touchstone' of the determination . . . 'remains whether the defendant purposefully established "minimum contacts" in the forum State,' " *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 108-09 (1987) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)), and these minimum contacts must be grounded in " 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " *Asahi Metal*, 480 U.S. at 109 (quoting *Burger King*, 471 U.S. at 475). The Barron and Jaffe Attorneys, all residents of Michigan, contend that they have not established sufficient minimum contacts with Illinois to satisfy the Due Process Clause of the Constitution under these recent cases.

We believe, however, that the Barron and Jaffe Attorneys' contacts with the State of Illinois are, for our purposes, simply irrelevant. We have already established that district courts exercise original subject matter jurisdiction over non-core matters pursuant to 28 U.S.C.A. section 1334 (West Supp. 1990). Since section 1334 provides federal question jurisdiction, the sovereign exercising its authority over the Barron and Jaffe Attorneys is the

United States, not the State of Illinois. Hence, whether there exist sufficient minimum contacts between the attorneys and the State of Illinois has no bearing upon whether the United States may exercise its power over the attorneys pursuant to its federal question jurisdiction. Certainly, the attorneys have sufficient contacts with the United States to be subject to the district court's *in personam* jurisdiction. *See Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987) (federal court in federal question case implements national, not state, policy), *cert. denied*, 485 U.S. 1007 (1988); *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979) ("Here the sovereign is the United States, and there can be no question but that the defendant, a resident citizen of the United States, has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court."). *See also In re Rusco Indus., Inc.*, 104 B.R. 548, 551 (Bankr. S.D. Ga. 1989); *In re K O Trucking Co.*, 99 B.R. 78, 80 (N.D. Ala. 1988); *Wieboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, 497 (N.D. Ill. 1988); *In re Sonnyco Coal, Inc.*, 89 B.R. 658, 669 (Bankr. S.D. Ohio 1988); *In re GEX Ky., Inc.*, 85 B.R. 431, 434 (Bankr. N.D. Ohio 1987); *In re Outlet Dep't Stores, Inc.*, 82 B.R. 694, 699 (Bankr. S.D.N.Y. 1988) (all concluding that minimum contacts with state are irrelevant when federal question bankruptcy jurisdiction exists). And nationwide service of process has been established in these cases by Bankruptcy Rule 7004(d). We therefore conclude that the nationwide service of process provisions of Bankruptcy Rule 7004(d) do not violate the Barron and Jaffe Attorneys' due process rights in this case, and that the district court may exercise its *in personam* jurisdiction over these attorneys.

VII.

Although we might stop there, we continue, for the sake of thoroughness, by reviewing whether the district court might have exercised its diversity jurisdiction in this case (for Diamond and Obie also invoked that court's diversity jurisdiction independent of its bankruptcy jurisdiction) pur-

suant to the Illinois Long-Arm Statute, Ill. Ann. Stat. ch. 110, ¶ 2-209 (Smith-Hurd 1990). In this regard, we defer substantially to the district court's findings of fact, but we will review, *de novo*, its conclusions of law. *See United States v. Hocking*, 860 F.2d 769, 772 (7th Cir. 1988).

Paragraph 2-209(a) provides, in pertinent part:

> Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this State;
>
> (2) The commission of a tortious act within this State. . . .

Ill. Ann. Stat. ch. 110, ¶ 2-209 (Smith-Hurd 1990).[12] Further, "[o]nly causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him or her is based upon subsection (a)." Ill. Ann. Stat. ch. 110, ¶ 2-209(f) (Smith-Hurd 1990).

Essentially, when they filed their complaint, Diamond and Obie alleged that the Barron and Jaffe Attorneys' malpractice amounted to the transaction of business and the commission of a tortious act in Illinois. The magistrate (and the district judge, who adopted the Report & Recommendation) disagreed, concluding that Diamond and Obie had not shown that the attorneys' sporadic contacts with

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[12] It appears that courts in Illinois may now base long-arm jurisdiction on "[t]he breach of any fiduciary duty within this State." Ill. Ann. Stat. ch. 110, ¶ 2-209(a)(11) (Smith-Hurd 1990) (as amended in 1989). Diamond and Obie have not asserted this jurisdictional basis—which was created after they filed this suit—for their claim. As such, we do not consider its application here.

Illinois were in any way related to the alleged malpractice or transaction of business.

In order to justify the exercise of jurisdiction pursuant to the Illinois long-arm statute, Diamond and Obie must demonstrate three things: (1) that the attorneys committed one of the jurisdictional acts enumerated in Paragraph 2-209; (2) that the cause of action "arose from" the act committed; and (3) that the exercise of long-arm jurisdiction is consistent with due process. *John Walker & Sons, Ltd. v. DeMert & Dougherty, Inc.*, 821 F.2d 399, 402 (7th Cir. 1987); *Jacobs/Kahan & Co. v. Marsh*, 740 F.2d 587, 590 (7th Cir. 1984). There seems to be little question that Diamond and Obie have satisfied the first of these elements. The magistrate recited the jurisdictional acts alleged by Diamond and Obie in their complaint, which included travel, letters, document revision and phone calls placed in Illinois. These allegations amount to a prima facie case; indeed, we "must accept all undenied factual allegations and resolve all factual disputes in favor of the party seeking to establish jurisdiction." *Saylor v. Dyniewski*, 836 F.2d 341, 342 (7th Cir. 1988); *see Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215 (7th Cir. 1984).

Determining whether the cause "arose from" these jurisdictional acts—the second element—is much more difficult. Illinois courts have liberally construed the term "arising from": Illinois's long-arm statute " 'requires only that the cause of action lie in the wake of the transaction of business.' " *John Walker & Sons*, 821 F.2d at 403 (quoting *Jacobs/Kahan & Co.*, 740 F.2d at 591); *see Loggans v. Jewish Community Center of Milwaukee*, 113 Ill. App. 3d 549, 555-57, 447 N.E.2d 919, 924-25 (1st Dist. 1983); *see also NTN Bearing Corp. v. Charles E. Scott, Inc.*, 557 F. Supp. 1273, 1275 (N.D. Ill. 1983). Applying this standard, the magistrate wrote that Diamond and Obie had failed to demonstrate that their malpractice action "arose from" any of the visits, phone calls, letters or services performed by the Barron or Jaffe Attorneys: "These

actions do not appear to constitute the malpractice of which plaintiffs complain." Report & Recommendation at 4.

We are perplexed by the magistrate's treatment of Diamond and Obie's jurisdictional argument. Diamond and Obie contend that the two sets of lawyers committed numerous instances of malpractice:

> (1) they simultaneously represented several corporations that were engaged in transactions with Diamond and Obie; (2) they failed properly to advise Diamond and Obie as to the conflict of interest created by that simultaneous representation; (3) they failed to withdraw from their conflicting representation when they should have done so; and (4) they failed properly to advise Diamond and Obie regarding Diamond's and Obie's fundamentally unsafe and unsound business practices.

Appellants' Brief at 10. Essentially, then, Diamond and Obie claim that their lawyers—who acted as general counsel and securities counsel—committed malpractice consistently throughout their ongoing representation. When the attorneys conducted business with, or provided legal advice to, Diamond and Obie in Illinois, they had a duty to reveal their conflict of interest to their clients. Their continuing failure to do so, argue Diamond and Obie, constitutes malpractice.

Assuming, as we must for purposes of determining jurisdiction, *Deluxe Ice Cream*, 726 F.2d at 1215, that these factual allegations have some merit, the Barron and Jaffe Attorneys had an obligation to disclose their conflict of interest when they transacted business or gave legal advice to Diamond and Obie in Illinois. Their alleged failure to do so, therefore, lies "in the wake of" their legal activities in Illinois. Unlike an attorney's legal work in *Yates v. Muir*, 112 Ill. 2d 205, 209-10, 492 N.E.2d 1267, 1269 (1986), which was "performed *exclusively* in Kentucky," the two sets of attorneys here do not dispute that they conducted some legal activities in Illinois. Their failure to disclose their alleged conflict of interest at the time

of rendering their services provides sufficient grounds for "arising from" jurisdiction.

Still, Diamond and Obie must satisfy the third prong of the standard—that the exercise of long-arm jurisdiction does not violate the due process rights of the attorneys. As we noted earlier, a court's assertion of personal jurisdiction satisfies the Constitution when it comports with "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see Burnham v. Superior Court of Cal.*, 110 S. Ct. 2105, 2110 (1990) (plurality). Further, " 'the constitutional touchstone' of the determination . . . 'remains whether the defendant purposefully established "minimum contacts" in the forum State,' " *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 108-09 (1987) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)), and these minimum contacts must be grounded in " 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " *Asahi Metal*, 480 U.S. at 109 (quoting *Burger King*, 471 U.S. at 475); *see Shaffer v. Heitner*, 433 U.S. 186 (1977).[13]

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[13] The Barron and Jaffe Attorneys urge us to apply the test for *in personam* jurisdiction proposed by a district court in *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 201-04 (E.D. Pa. 1974), which adopts a notion of "fairness" as the touchstone for *in personam* jurisdiction. *Oxford* suggests that courts must examine the extent of a defendant's contacts with the foreign jurisdiction, the inconvenience faced by a defendant in defending the case there, the maintenance of judicial economy, the probable site of discovery proceedings and the nature of the regulated activity in question. *Id.* at 203-04. The problem with the *Oxford* test, however, is that this court has expressly rejected it. *Fitzsimmons v. Barton*, 589 F.2d 330, 334 (7th Cir. 1979); *see Lisak v. Mercantile Bancorp., Inc.*, 834 F.2d 668, 671-72 (7th Cir. 1987) (approving *Fitzsimmons*), *cert. denied*, 485 U.S. 1007 (1988). And contrary to the attorneys' protestations, the Supreme Court's decision in

(Footnote continued on following page)

Diamond and Obie's suit, in our view, is controlled directly by these Supreme Court decisions. The Barron Attorneys, as general counsel, and the Jaffe Attorneys, as securities counsel, intentionally provided at least some services to an Illinois resident in Illinois. The fact that they provided services rather than tangible goods makes little difference; their actions were "purposely directed toward the forum State." *Asahi Metal*, 480 U.S. at 112 (plurality) (emphasis removed); *see Burger King*, 471 U.S. at 475. There is no dispute here whether it was foreseeable that at least some of the attorneys' services would be performed in Illinois; the attorneys tailored their representation—which was performed through visits, letters and phone calls, and which consisted of document revisions and legal consultations—to their clients, Diamond and Obie. *See Mason v. F. LLI Luigi & Franco Dal Maschio Fu G.B.*, 832 F.2d 383, 386 (7th Cir. 1987) (custom-made products subject maker to personal jurisdiction in forum). And the precise number of physical visits to Illinois, in any event, may be irrelevant:

> Jurisdiction . . . may not be avoided merely because the defendant did not physically enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are purposefully directed toward residents of another State,

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[13] *continued*
Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)—and *Bauxites*'s emphasis on individual liberty instead of sovereignty (for purposes of *in personam* jurisdiction, *id.* at 702)—is not inconsistent with *Fitzsimmons* or *Lisak*.

> we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King, 471 U.S. at 476 (emphasis removed). Further, we are not persuaded that the assertion of personal jurisdiction *in this proceeding* would violate the notion of "fair play and substantial justice" as established in *International Shoe*; the Barron and Jaffe Attorneys have not demonstrated that their burden in litigating this proceeding in Illinois—the residence of the clients they represented and the site of at least some of their actions—is excessive. *See Burger King*, 471 U.S. at 476-78 (listing factors). We cannot say, therefore, that the extension of Illinois's long-arm statute would violate the due process rights of the Barron or Jaffe Attorneys. Hence, we conclude that the district court erred in dismissing Diamond and Obie's suit for lack of personal jurisdiction.

VIII.

Finally, the Jaffe Attorneys assert that, even if the district court improperly dismissed the suit for lack of jurisdiction, its decision can be upheld on an alternate ground: Diamond and Obie's complaint, they argue, fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Jaffe Attorneys posit that the central issue in the case is whether they failed to alert Diamond and Obie to their managers' scheme to defraud the companies' investors. Jaffe Attorneys' Brief at 25. Since, it is contended, Illinois courts will not aid a fraudfeasor who seeks the court's assistance in relieving himself of the consequences of his fraud, *see, e.g.*, *Goldstein v. Lustig*, 154 Ill. App. 3d 595, 603, 507 N.E.2d 164, 170 (1st Dist. 1987); *Robins v. Lasky*, 123 Ill. App. 3d 194, 202, 462 N.E.2d 774, 779 (1st Dist. 1984), Diamond and Obie have failed to state a claim upon which relief can be granted. Therefore, the Jaffe Attorneys urge, Judge Williams's dismissal of the suit was proper and should be affirmed.

This argument need not detain us long. There is substantial question regarding Diamond and Obie's role in the alleged fraud; we certainly do not resolve such questions in favor of the movant with respect to a Rule 12(b)(6) motion when the plaintiff makes contrary allegations in his complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985), *cert. denied*, 475 U.S 1047 (1986). In any event, the Jaffe Attorneys owed their duty to Diamond and Obie, not to a group of managers who allegedly acted against the corporations' interests and who allegedly defrauded the corporations' investors.[14] *Cf. Wencordic Enters., Inc. v. Berenson*, 158 Ill. App. 3d 913, 511 N.E.2d 907 (2d Dist. 1987); *In re Investors Funding Corp.*, 523 F. Supp. 533, 540-41 (S.D.N.Y. 1980). We cannot agree, therefore, that Diamond and Obie have failed to state a claim upon which relief can be granted.

IX.

Marathon and BAFJA dramatically changed the exercise of federal jurisdiction pursuant to the nation's bankruptcy laws. Consistent with these changes (and with Article III of the Constitution), Bankruptcy Rules 1001 and 7001 were amended to permit the application of the procedural rules of bankruptcy in federal district court. These

[14] It is premature, at this stage of the proceedings, to invoke the principles of estoppel articulated in *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982). There, we concluded that, in specific circumstances, a corporation, whose officers commit fraud to the benefit of the corporation, may be estopped from shifting the responsibility of the fraud to outside auditors. Whether the Jaffe Attorneys can establish a *Cenco*-like defense will depend upon further development of this case, including whether the fraud benefited the corporations and whether a potential recovery would inure to the benefit of the fraudfeasors. *See Schacht v. Brown*, 711 F.2d 1343, 1345-48 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Cenco*, 686 F.2d at 454-57. The facts of this case, at the present time, simply are insufficiently developed to allow dispositive application of *Cenco*.

amendments authorize district courts to exercise their *in personam* jurisdiction over parties pursuant to the nationwide service of process provisions of Rule 7004(d). A contrary reading of Rule 7004(d) seems unfaithful to the literal terms of the Bankruptcy Rules and to the underlying congressional goals that culminated in this extensive overhaul of the bankruptcy system.

REVERSED and REMANDED

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Report and Recommendation
of Magistrate James T. Balog
(May 19, 1989)

REPORT AND RECOMMENDATION
OF MAGISTRATE JAMES T. BALOG
(MAY 19, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DIAMOND MORTGAGE	)	
CORPORATION of ILLINOIS,	)	
Debtor-In-Possession, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No. 88 C 6822
v.	)	
	)	
PETER SUGAR, et al.,	)	
	)	
Defendants.	)	

TO: HONORABLE ANN C. WILLIAMS, JUDGE
UNITED STATES DISTRICT COURT

HONORABLE JUDGE:

REPORT AND RECOMMENDATION
of Magistrate James T. Balog

Report and Recommendation
of Magistrate James T. Balog
(May 19, 1989)

Before the court is the motion of defendants Peter Sugar, et al., to dismiss the complaint of plaintiffs Diamond Mortgage Corporation of Illinois, et al., or in the alternative to transfer this action pursuant to 28 U.S.C. § 1404.

Plaintiffs bring this action alleging that defendants committed legal malpractice and breached their fiduciary duty to plaintiffs. Plaintiff Diamond Mortgage Corporation ("Diamond") was in the business of originating mortgage loans to Illinois borrowers, and sold these loans to Illinois investors through plaintiff A.J. Obie & Associates, Inc. ("Obie"). Plaintiffs filed Chapter 11 bankruptcy petitions in the United States Bankruptcy Court for the Northern District of Illinois in August, 1986. The defendants, two sets of attorneys, represented the plaintiffs at various times. Defendants all reside in Michigan.

Plaintiffs allege that the defendants breached their fiduciary duty and committed legal malpractice by (1) improperly advising plaintiffs about transactions with certain Michigan corporations defendants were simultaneously representing, (2) failing to withdraw from this conflicting representation, and (3) improperly advising plaintiffs regarding their own practices. As a result of this conduct, plaintiffs contend that they suffered damages insofar as they were looted of millions of dollars in the transactions with Michigan corporations and they lost million of dollars in connection with their own business practices. Defendants move to dismiss plaintiff's action, arguing that this court lacks personal jurisdiction over the defendants, and that plaintiffs have failed to state a claim upon which relief can be granted. In the alternative, defendants

contend that this action should be transferred to the United States District Court for the Eastern District of Michigan.

Personal Jurisdiction

Plaintiffs assert that this court has personal jurisdiction over defendants under with Bankruptcy Rule 7004(d) or the Illinois' Long Arm Jurisdiction Statute. Ill. Rev.Stat.ch. 110, ¶ 2-209(a). Rule 7004(d) provides for nationwide service of process in bankruptcy proceedings. This rule, and all other rules in Part VII of the Bankruptcy Rules, is limited in scope by Rule 7001. Under Rule 7001, the procedures prescribed in Part VII apply only to adversary proceedings brought in a bankruptcy court. While the instant case may stem from a bankruptcy proceeding, it is a legal malpractice action brought in Federal district court. As such, Bankruptcy Rule 7004(d) is inapplicable.

Plaintiffs cite the case of Stavriotis v. Litwin, No. 86 C 2328 (N.D. Ill. Oct. 16, 1986) to counter this notion. (See Exhibits to Plaintiff's Consolidated Memorandum, Ex. 1). Stavriotis dealt with a case initially before the bankruptcy court, over which the district court had asserted control by withdrawing its reference. The court merely held that Rule 7004(d) "is applicable to those adversary cases in which the district court has withdrawn its reference to the bankruptcy court." slip op. at 5. The rule, then, is not applicable to create personal jurisdiction over the defendants in the instant case.

Report and Recommendation
of Magistrate James T. Balog
(May 19, 1989)

Alternatively, plaintiffs contend that defendants are subject to the jurisdiction of this court under Illinois' long arm statute. The Illinois long arm statute establishes jurisdiction over a person who performs one of the following acts out of which the cause of action arises:

> (1) The transaction of any business within this State;
>
> (2) The commission of a tortious act within this State;. . .

Ill.Rev.Stat.ch. 110, ¶ 2-209(a). Under Illinois law, the party seeking to establish personal jurisdiction must make out a prima facie case. Saylor v. Dyniewski, 836 F.2d 341, 342 (7th Cir. 1988). The court must accept all the undenied factual allegations and resolve disputes in favor of the party seeking to establish personal jurisdiction. Id. These facts must be considered in a two-part analysis: to determine whether the facts meet the requirements of the long arm statute and whether they meet the requirements of the due process clause of the fourteenth amendment. Id. at 343; J. Walker & Sons v. DeMert & Dougherty, Inc., 821 F.2d 399, 401-402 (7th Cir. 1987).

Plaintiffs cite several activities on defendants' parts which they content amount to the transaction of business in Illinois. In

the case of the Barron defendants,[1] plaintiffs contend that Ronald Barron made several trips to Chicago to assist in the formation of Diamond. Barron, an attorney licensed to practice in Michigan, had originally been representing the Diamond Mortgage Corporation of Michigan, and was involved in the establishment of Diamond in Illinois. (See Exhibits to Plaintiff's Consolidated Memorandum, Ex. 2). In addition, plaintiffs cite numerous letters and phone calls to Illinois providing legal advice. These communications apparently refer to notes to be used for a mortgage, revision of mortgage-closing packages, Truth In Lending Forms, and brokerage fee issues. (See, Id., Exs. 3-6). Under the Illinois long arm statute, jurisdiction will be for transaction of business only if the cause of action arises out of that business. Ill. Rev.Stat.ch. 110, ¶ 209-2(a), (c); Saylor, 836 F.2d at 343; J. Walker, 821 F.2d at 402. Plaintiff does not relate the cited acts of the Barron defendants to its claims of malpractice and breach of fiduciary duty. The conduct cited simply does not refer to the alleged conflict of interest or faulty legal advice upon which plaintiffs base their claims.

With respect to the Jaffe defendants -- Pete Sugar, David Warner, and Jaffe, Snider, Raitt & Heuer -- plaintiffs also cite visits, phone calls, and letters to Illinois. Warner made one trip to Illinois to provide legal advice, while Sugar made at least two visits. (See, Plaintiff's Consolidated Memorandum, at 8-9). Similarly, however, plaintiffs do not link these acts to the specific

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[1]The "Barron defendants" are attorney Ronald M. Barron and the five law firms with which he has been associated since 1981.

conduct giving rise to their complaint. The documents provided by plaintiffs deal with advertising and securities offerings. (See, Exhibits to Plaintiff's Consolidated Memorandum, Exs. 10-14). These actions do not appear to constitute the malpractice of which plaintiffs complain.

In attempting to establish jurisdiction under the long arm statute, plaintiffs incorrectly argue that defendants' physical presence in Illinois alone is insufficient for jurisdiction under the transaction of business test. (Plaintiff's Consolidated Memorandum, at 9). The law is quite clear, even in the cases cited by plaintiffs, that the act constituting the transaction of business must also give rise to the cause of action in order to establish jurisdiction. See e.g. Hyatt International v. Inversiones Los Jabillos, C.A., 558 F.Supp. 932, 934-935 (N.D. Ill. 1982) (even one visit is sufficient to establish jurisdiction if the cause of action arose out of defendant's conduct on that visit). In this case, plaintiffs have simply failed to make even a prima facie showing that the conduct of the various defendants on their visits to or other contacts with Illinois is the conduct on which plaintiffs base their claim. Therefore, plaintiffs have not established that this court has personal jurisdiction over defendants under the transaction of business test.

The Illinois long arm statute also provides for personal jurisdiction over one who commits a tortious act within the State. Ill.Rev.Stat.ch. 110, ¶ 2-209(a)(2). Plaintiffs contend that defendants committed the tort of malpractice in Illinois by rendering faulty legal advice through personal visits, phone calls and letters.

Report and Recommendation
of Magistrate James T. Balog
(May 19, 1989)

They further contend that this advice resulted in a substantial financial injury to them in Illinois. Defendants contend that even if their legal advice amounted to tortious acts, such acts occurred in Michigan, where they live and practice.

As a general rule, the place of a tortious act is where the last act took place necessary to make the defendant liable. Yates v. Muir, 112 Ill. 2d 205, 492 N.E. 2d 1267, 1268 (1986). Nevertheless, an Illinois court does not acquire jurisdiction under the "last act" doctrine simply because an economic injury is felt in Illinois. Id., Turnock v. Cope, 816 F.2d 332, 335 (7th Cir. 1987). Thus, it is clear that in this case, the fact that plaintiffs' financial injury occurred in Illinois is not, standing alone, sufficient to establish personal jurisdiction over defendants.

Plaintiffs further contend that defendants were present in Illinois and committed legal malpractice. Once again, however, plaintiffs fail to point to, or describe, any link between the visits to Illinois and the advice that amounted to malpractice. Even when a defendant has clearly visited Illinois, there is no personal jurisdiction unless the tortious act occurred on that visit. Turnock, 816 F.2d at 334. The visits which plaintiffs have documented have dealt with the establishment of Diamond's Illinois office and advertising. If there is a link between these topics and the alleged malpractice, plaintiffs have not established it.

In addition, it should be noted that the Illinois Supreme Court has suggested that an individual who seeks personal services, such as legal advice, from an out-of-state source should not expect

to be able to sue that source wherever the consequences of those services might occur. Yates, 492 N.E. 2nd at 1269. There is a paucity of information regarding the establishment of the attorney-client relationship in this case. It is, therefore, unclear why plaintiffs selected Michigan counsel to represent their Illinois business. Nevertheless, plaintiffs should not be surprised that the proper jurisdiction in which to air their complaints about counsel would appear to be Michigan, where defendants live, are licensed to practice, and where the bulk of the legal work was performed.

Based on the facts provided by plaintiffs at this time, this court does not have personal jurisdiction over the defendants under Illinois' long arm statute. As such, there is no need to consider whether minimum contacts required by due process are present. Similarly, the issues of proper venue and the adequacy of plaintiff's claim need not be addressed, and indeed, this court is without jurisdiction to do so.

For these reasons, it is recommended that the motion of defendants to dismiss plaintiff's complaint for lack of personal jurisdiction be granted.

Respectfully submitted,

JAMES T. BALOG
United States Magistrate

DATE: May 19, 1989

Minute Order
(July 19, 1989)

MINUTE ORDER
(JULY 19, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DIAMOND MORTGAGE CORPORATION of ILLINOIS, Debtor-In-Possession, et al.,	)	
Plaintiffs,	)	Case No. 88 C 6822
v.	)	Hon. Ann C. Williams
PETER SUGAR, et al.,	)	
Defendants.	)	

DOCKET ENTRY:

This case is dismissed for lack of personal jurisdiction. Status hearing set for August 1, 1989 is stricken.

ORDER:

The court adopts Magistrate Balog's Report and Recommendation. The court agrees that the defendants are not within the

Minute Order
(July 19, 1989)

reach of Illinois' long-arm statute for the reasons stated by the magistrate. The court also agrees that Bankruptcy Rules 7001 and 7004(d) do not provide a basis for jurisdiction. While there is a superficial logic to plaintiffs' argument regarding the congruence of the district court and the bankruptcy court, pressed to its logical conclusion, this argument could result in any bankrupt debtor clogging the federal courts with multiple independant actions in the district courts, and having access to the extraordinarily powerful weapons provided in the Bankruptcy Rules, such as 7004(d), for each district court case. If plaintiffs want to use Bankruptcy Rules 7001 and 7004(d), they can do so in a bankruptcy case, before a bankruptcy court, as the rules provide. Metro Communications v. Baltimore Radio Show, 68 B.R. 9, 11 (W.D.Pa. 1986). This case is dismissed for lack of personal jurisdiction.

/s/ Ann C. Williams

Minute Order
(August 1, 1989)

MINUTE ORDER
(AUGUST 1, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DIAMOND MORTGAGE	)	
CORPORATION of ILLINOIS,	)	
Debtor-In-Possession, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No. 88 C 6822
v.	)	
	)	Hon. Ann C. Williams
PETER SUGAR, et al.,	)	
	)	
Defendants.	)	

MOTION:

Motion for Reconsideration and Clarification

DOCKET ENTRY:

Plaintiffs motion for reconsideration and clarification is denied for the reasons stated in open court.

Bench Opinion of Judge Williams
(August 1, 1989)

BENCH OPINION OF JUDGE WILLIAMS
(AUGUST 1, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DIAMOND MORTGAGE CORPORATION of ILLINOIS, Debtor-In-Possession, et al.,	)	
Plaintiffs,	)	Case No. 88 C 6822
v.	)	Hon. Ann C. Williams
PETER SUGAR, et al.,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ANN C. WILLIAMS

THE COURT: All right. With respect to the motion that's been brought, the motion for reconsideration and clarification, the motion is denied. The plaintiffs are correct that the 1987 amendments to the bankruptcy rules abolish any distinction between the district court and the bankruptcy court, and thus

there is some force to the plaintiff's argument that 7004 subsection D and 7001 give the district court personal jurisdiction in this case since this case is related to a Chapter 11 proceeding.

However, in this Court's view this case is not a core proceeding under Chapter 11, 28 United States Code Section 157, and the bankruptcy rules seem designed for these kinds of cases such as the Wieboldt case on which plaintiff relies. Wieboldt was a core proceeding under Chapter 11, not a non-core proceeding. So in this Court's view its application is questionable here.

Although it's true that the Court has jurisdiction under 28 U.S.C. Section 1334, which would be subject matter jurisdiction, it is not a foregone conclusion that the bankruptcy rule 7001 attaches to all cases under that grant of subject matter jurisdiction or only the core Chapter 11 cases. There is no specific authority on this point. And since the 1987 amendments to the rules do not deal explicitly with this issue, I am not convinced that simply deleting the words in a bankruptcy court changes the law the way the plaintiffs allege, especially since -- when considering the general principle that courts do not extend their jurisdiction absent a specific statutory grant.

With respect to the Illinois jurisdictional issue, my ruling remains the same.

Concerning giving additional discovery, I don't think additional discovery is necessary, and so the motion is denied.

Judgment In A Civil Case
(August 28, 1989)

JUDGMENT IN A CIVIL CASE
(AUGUST 28, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DIAMOND MORTGAGE CORPORATION of ILLINOIS, Debtor-In-Possession, et al.,	)	JUDGMENT IN A CIVIL CASE
Plaintiffs,	)	Case No. 88 C 6822
v.	)	Hon. Ann C. Williams
PETER SUGAR, et al.,	)	
Defendants.	)	

_X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment by dismissal for lack of personal jurisdiction is entered in favor of defendants and against plaintiffs.

August 28, 1989
Date

H. Stuart Cunningham
Clerk
/s/
(By) Deputy Clerk

Denial of Motion for Rehearing
(November 21, 1990)

DENIAL OF MOTION FOR REHEARING
(NOVEMBER 21, 1990)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 21, 1990

Before

Hon. HARLINGTON WOOD, Jr., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

DIAMOND MORTGAGE CORPORATION of ILLINOIS, Debtor-In-Possession, et al.,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellants,	)	
Nos. 89-2804 & 89-3003 **v.**	)	No. 88 C 6822
PETER SUGAR, DAVID D. WARNER, et al.,	)	Ann Claire Williams, Judge.
Defendants-Appellees.	)	

Denial of Motion for Rehearing
(November 21, 1990)

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Order Staying Mandate
(November 30, 1990)

ORDER STAYING MANDATE
(NOVEMBER 30, 1990)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 30, 1990

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

DIAMOND MORTGAGE CORPORATION of ILLINOIS,	)	
Debtor-In-Possession, et al.,	)	Appeal from the United
	)	States District Court for
Plaintiffs-Appellants,	)	the Northern District of
	)	Illinois, Eastern Division.
Nos. 89-2804 & 89-3003 v.	)	
	)	No. 88 C 6822
PETER SUGAR, DAVID D. WARNER, et al.,	)	Ann Claire Williams,
	)	Judge.
Defendants-Appellees.	)	

On consideration of the **MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI** filed herein on 11/28/90, by counsel for appellee,

Order Staying Mandate
(November 30, 1990)

IT IS ORDERED that said motion is **GRANTED** and the mandate in this appeal is stayed to and including 12/31/90.

Order Denying Reconsideration
(December 14, 1990)

ORDER DENYING RECONSIDERATION
(DECEMBER 14, 1990)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 14, 1990

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

DIAMOND MORTGAGE CORPORATION of ILLINOIS, Debtor-In-Possession, et al.,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellants,	)	
Nos. 89-2804 & 89-3003 **v.**	)	No. 88 C 6822
PETER SUGAR, DAVID D. WARNER, et al.,	)	Ann Claire Williams, Judge.
Defendants-Appellees.	)	

This matter comes before the court for its consideration of the following documents:

Order Denying Reconsideration
(December 14, 1990)

1. "MOTION FOR RECONSIDERATION OF ORDER GRANTING STAY OF MANDATE" filed herein on December 6, 1990, by counsel for the appellants.

2. "RESPONSE TO MOTION FOR RECONSIDERATION OF ORDER GRANTING STAY OF MANDATE" filed herein on December 11, 1990, by counsel for the appellees.

On consideration thereof,

IT IS ORDERED that the "Motion for reconsideration of order granting stay of mandate" is **DENIED**.

Statutes and Court Rules
Cited Pursuant to Rule 14.1(f)

STATUTES AND COURT RULES CITED PURSUANT TO RULE 14.1(f)

28 U.S.C. § 1334(b): Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 2075: The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.

Such rules shall not abridge, enlarge, or modify any substantive right.

Statutes and Court Rules
Cited Pursuant to Rule 14.1(f)

Bankruptcy Rule 7004(d): Nationwide Service of Process. The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

Bankruptcy Rule 7001: Scope of Rules of Part VII. An adversary proceeding is governed by the rules of this Part VII. It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11 or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, or 13 plan, (9) to obtain a declaratory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed pursuant to 28 U.S.C. § 1452.

Supreme Court, U.S.
FILED
JAN 22 1991
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-1021

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PETER SUGAR, DAVID D. WARNER, and JAFFE, SNIDER, RAITT & HEUER, Professional Corporation,

Petitioners,

v.

DIAMOND MORTGAGE CORPORATION OF ILLINOIS and A.J. OBIE & ASSOCIATES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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No. 90-1021

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

PETER SUGAR, DAVID D. WARNER, and JAFFE, SNIDER, RAITT & HEUER, Professional Corporation,

Petitioners,

v.

DIAMOND MORTGAGE CORPORATION OF ILLINOIS and A.J. OBIE & ASSOCIATES, INC., Debtors-in-Possession,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Diamond Mortgage Corporation of Illinois ("Diamond") and A.J. Obie & Associates, Inc. ("Obie"), respectfully request that this Court deny the petition for a writ of certiorari seeking review of the decision below. The

opinion of the United States Court of Appeals for the Seventh Circuit is reported at 913 F.2d 1233 (1990).

SUMMARY OF ARGUMENT

1. The judgment below rests on alternative grounds, one of which is solely a matter of Illinois law. Thus, even if this Court were inclined to review the federal-law issue in this case, it could not change the outcome unless the Court also reviewed and reversed the Court of Appeals' state-law holding. This Court should not expend its limited resources in reviewing appellate determinations of state law or in issuing advisory opinions that cannot change the judgment below.

2. Moreover, Petitioners' argument for review of the federal-law issue demonstrates no conflict with any opinion of this Court, no conflict among the circuits, and no dissenting opinions or en

banc consideration of the issue in the Court of Appeals. Indeed, Petitioners themselves demonstrate a unanimity of judicial and academic support for the Court of Appeals' holding and merely argue that all these courts and commentators are "confused." Only Petitioners are confused. The petition presents no federal issue needing clarification and should be denied.

STATEMENT OF THE CASE

Diamond was a mortgage lender that made loans on real estate located in Illinois. It is an Illinois corporation, and, at all times, its only offices have been in Illinois. Obie was an affiliated Illinois corporation that offered for sale, solely to Illinois investors, mortgage notes originated by Diamond and secured by Illinois real estate.

On August 25, 1986, Diamond and Obie filed petitions for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois. Some investors had received a properly recorded assignment of a mortgage and were treated as secured creditors. Many other investors, however, never were assigned a mortgage and became unsecured creditors of the bankruptcy estates. The corporations' combined insolvency exceeded $10 million.

Petitioners are Detroit-based attorneys who represented Diamond and Obie as securities counsel from 1981 until shortly before the bankruptcies.[1/]

1/ Diamond also sued Michigan attorney Ronald M. Barron (and several law firms of which he was senior partner). The Barron defendants acted as Diamond's and Obie's general counsel during the 1981-86 period. Although the Court of Appeals' ruling applies to the Barron defendants, they have not joined in Petitioners' petition or filed one of their own.

Petitioners prepared the offering circulars distributed by Obie to Illinois investors. They also reviewed and revised advertising materials used by Obie to solicit Illinois purchasers for the Diamond mortgage notes. Finally, they corresponded with Illinois regulatory agencies on Diamond's and Obie's behalf.

At the same time they represented Diamond and Obie, Petitioners also represented several Michigan-based corporations affiliated with Diamond and Obie. The Complaint alleges that Petitioners committed legal malpractice and breached their fiduciary duties to Diamond and Obie in four ways. First, they simultaneously represented the Michigan corporations that were transacting business with Diamond and Obie and which looted Diamond and Obie in those transactions. Second, they failed to advise Diamond and Obie properly as to the

conflict of interest posed by that simultaneous representation. Third, they failed to withdraw from the conflicting representation when they should have done so. Fourth, they failed properly to advise Diamond and Obie regarding the corporations' own unsafe and unsound business practices. These breaches prolonged Diamond's and Obie's existence past the point of insolvency and deepened the insolvency.

In 1988, Diamond and Obie, as debtors-in-possession, filed the Complaint in the United States District Court for the Northern District of Illinois, the district in which the Chapter 11 cases were pending.[2/] The Complaint predicated

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[2/] Diamond and Obie filed the Complaint with the District Court clerk because they were entitled to a jury trial, and it was established in the Northern District of Illinois that Article I bankruptcy judges could not conduct jury trials. See, e.g., Reda, Inc. v. Harris Trust & Savings Bank

(continued...)

subject matter jurisdiction on both 28 U.S.C. §§ 1332(a)(1) (diversity of citizenship) and 1334(b) (bankruptcy). Petitioners do not contest the validity of either jurisdictional basis. Pet. at 2-3 and n. 3.

Petitioners moved to dismiss under Fed. R. Civ. P. 12(b)(2), alleging lack of personal jurisdiction.[3/] Diamond and

---

[2/] (...continued)
(In re Reda, Inc.), 60 Bankr. 178, 182-83 (Bankr. N.D. Ill. 1986); cf. Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782, 2802 (1989) (leaving open question whether bankruptcy judges can conduct jury trials). This Court recently remanded on jurisdictional grounds a case in which certiorari had been granted to decide whether bankruptcy judges can constitutionally conduct some jury trials. Insurance Co. of the State of Pennsylvania v. Ben Cooper, Inc., 111 S. Ct. 425 (1990).

[3/] Petitioners also moved to dismiss under Fed. R. Civ. P. 12(b)(6), alleging failure to state a claim for which relief can be granted. The District Court did not reach this issue. Petitioners reasserted their 12(b)(6) motion in the Court of Appeals, which rejected Petitioners' claim. Petitioners' Appendix
(continued...)

Obie argued that jurisdiction was proper pursuant to nationwide service of process under Bankruptcy Rule 7004(d) and the Illinois long-arm statute, Ill. Rev. Stat. ch. 110, ¶ 2-209.[4/] On Petitioners' motion, the District Court stayed all discovery, including discovery as to jurisdictional facts.[5/]

[3/] (...continued)
("APP.") 26a-27a. Petitioners do not seek review of that ruling here.

[4/] This statute was amended effective September 7, 1989 by Public Act 86-840. The current statute differs significantly from the statute in effect when the Complaint was filed. See Exhibit 1 hereto.

[5/] Petitioners assert that the factual record is "extensive" and includes all of their files. Pet at 4. While Diamond and Obie took some discovery pursuant to Bankruptcy Rule 2004 before filing the Complaint, they never had the opportunity to take discovery on the specific jurisdictional issues Petitioners raised. Nor did they have the opportunity to test Petitioners' assertion that all files were turned over. Indeed, some files were withheld on a claim of privilege and were not produced when the asserted privilege was later waived.

The Magistrate, to whom the motion was referred, recommended dismissal. APP. 36a. Apparently relying on the text of Bankruptcy Rule 7001 prior to its 1987 amendment, the Magistrate held that the Bankruptcy Rules could only be applied in Bankruptcy Court. APP. 31a. Further, the Magistrate held that, notwithstanding Petitioners' acknowledged contacts with Illinois, Diamond's and Obie's claims did not "arise from" those contacts within the meaning of the Illinois long-arm statute. APP. 32a-36a.

The District Court adopted the Magistrate's recommendation in a one-paragraph minute order. While conceding there was "superficial logic" to the proposition that the bankruptcy courts are no longer jurisdictionally distinct from the district courts, the District Court held that Diamond and Obie could utilize Bankruptcy Rule 7004(d) only in bankruptcy

court. APP. 38a. The District Court adopted without comment the Magistrate's recommendation as to the Illinois long-arm statute.

Diamond and Obie moved to reconsider, noting again that the 1987 Bankruptcy Rules amendments had made the Bankruptcy Rules expressly applicable in the district courts. The District Court denied reconsideration, this time holding that the Bankruptcy Rules are applicable only in "core proceedings" as defined in 28 U.S.C. § 157. APP. 41a.

Contrary to Petitioners' assertion (Pet. at 21) that the District Court "found that it could not assert jurisdiction over the Jaffe attorneys consistent with these due process considerations," neither the District Court nor the Magistrate made reference to any due process considerations.

The Court of Appeals reversed, holding that the adversary Bankruptcy Rules, and Rule 7004(d) in particular, by definition apply to this proceeding and that the District Court's exercise of personal jurisdiction over Petitioners would not violate the Fifth Amendment Due Process Clause. APP. 12a-20a. In so doing, the Court of Appeals rejected Petitioners' contentions that the Bankruptcy Rules apply only to proceedings "commenced" in a bankruptcy court and that they apply only to "core" proceedings. APP. 12a-16a; APP. 17a-18a.

The Court of Appeals also reversed the District Court's judgment as to the Illinois long-arm statute, finding an independent and alternative basis for personal jurisdiction under Illinois law. While the Magistrate and the District Court had held that the statute conferred jurisdiction only if specific negligent

acts were performed in Illinois, the Court of Appeals found the Magistrate's treatment "perplex[ing]." APP. 23a. Noting that Illinois courts consistently require only that the cause of action "lie in the wake of the transaction of business" in Illinois, APP. 22a, the Court of Appeals observed that Petitioners' failure to reveal their conflicts of interest and to remedy them lay "in the wake of" all their contacts with Illinois, including visits, correspondence, and telephone calls. APP. 23a.

Finally, the Court of Appeals rejected Petitioners' contention that the District Court's exercise of personal jurisdiction under the Illinois long-arm statute would violate the Due Process Clause. There was no dispute that Petitioners had intentionally provided services directly to their Illinois clients and that those services were

expressly tailored to the requirements of their Illinois clients. APP. 24a-25a. Nor had Petitioners shown that litigation in the Northern District of Illinois, the location of the clients they had represented and where they had performed acts on those clients' behalf, was excessively burdensome. APP. 26a.[6/]

After the Court of Appeals issued its opinion, Petitioners filed a petition for rehearing with suggestion for rehearing en banc. The Court of Appeals denied this petition, no judge in active service requesting a vote for rehearing. APP. 43a-44a.

[6/] Petitioners, who are based in Detroit, contended they could be sued anywhere in the state of Michigan, but that litigation in Chicago would impose an undue (and, therefore, unconstitutional) burden. However, in practical terms, travel between Detroit and Chicago is far less burdensome than travel between Detroit and, for example, Michigan's Upper Peninsula.

REASONS FOR DENYING THE PETITION

I.
THE JUDGMENT BELOW RESTS ON AN INDEPENDENT STATE-LAW GROUND IN WHICH THERE IS NO FEDERAL INTEREST.

Wholly apart from the bankruptcy issue resolved by the Court of Appeals, the decision below rests alternatively and independently on personal jurisdiction conferred by the Illinois long-arm statute. Thus, even if this Court were to conclude that the Court of Appeals wrongly decided the bankruptcy issue, the judgment could not be changed unless this Court reviewed and reversed the Court of Appeals on a question of Illinois statutory interpretation.

This Court should not grant certiorari to interpret Illinois law. Implicitly recognizing this, Petitioners attempt to recast the state-law issue as a question of standard-of-review. This

attempt mischaracterizes the Court of Appeals' holding and, even if accepted arguendo, presents only a fact-bound inquiry unsuited to review by this Court.

A. This Court Should Not Devote Its Limited Resources To Deciding A Pure Question Of State Law.

This Court "do[es] not ordinarily review the holding of a court of appeals on a matter of state law." Pierson v. Ray, 386 U.S. 547, 558 n. 12 (1967); see also Haring v. Prosise, 462 U.S. 306, 314 n. 8 (1983). There is no significant federal interest in having this Court interpret the Illinois long-arm statute. The Illinois courts are charged with principal responsibility for interpreting Illinois law. This Court's limited resources should be reserved for other purposes.

Moreover, the Illinois long-arm statute has been significantly amended

since the time this action was commenced. See Exhibit 1 hereto.[7/] It would be particularly wasteful for this Court to expend its resources on interpreting a superseded statute.

This Court routinely "accord[s] great deference to the interpretation and application of state law by the courts of appeals." Pembaur v. Cincinnati, 475 U.S. 469, 484 n. 13 (1986); see also Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 534 (1949). The Court of Appeals has extensive experience in interpreting the Illinois long-arm statute

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[7/] While the former statute applicable here had been interpreted by Illinois courts independently of the Due Process Clause, see, e.g., Green v. Advance Ross Electronics Corp., 86 Ill. 2d 431, 436-37, 427 N.E.2d 1203, 1206 (1981); Petty v. Cadwallader, 135 Ill. App. 3d 695, 697, 482 N.E.2d 225, 227 (4th Dist. 1985), the amended statute now permits jurisdiction on "any . . . basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." P.A. 86-840 § 1(c).

and has issued numerous opinions on the relevant issue.[8/] The Court of Appeals did not ignore the cases on which Petitioners relied but, rather, carefully considered them. APP. 23a-24a. Exercise of this Court's certiorari jurisdiction to review an issue of solely historical and parochial interest is wholly unjustified.

Finally, the law of personal jurisdiction is especially fact bound. See, e.g., Shaffer v. Heitner, 433 U.S. 186, 221 (1977) (Brennan, J., concurring in part and dissenting in part). Even if this Court were inclined to review a question of state law, review of the holding below is unlikely to generate any

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[8/] See, e.g., John Walker & Sons, Ltd. v. DeMert & Dougherty, Inc., 821 F.2d 399, 401-04 (7th Cir. 1987); Jacobs/Kahan & Co. v. Marsh, 740 F.2d 587, 589-91 (7th Cir. 1984); Deluxe Ice Cream Co. v. R.C.H. Tool Corp., 726 F.2d 1209, 1212-16 (7th Cir. 1984); In re Oil Spill by Amoco Cadiz, 699 F.2d 909, 915 (7th Cir.), cert. denied sub nom. Astilleros Espanoles, S.A. v. Standard Oil Co., 464 U.S. 864 (1983).

principles of general application even for Illinois litigants.

B. The Court Of Appeals Did Not Improperly Disturb Any Factual Findings By The District Court.

Petitioners attempt to wring a federal issue out of a state-law question by asserting that the Court of Appeals "improperly substituted its views for those of the district court." Pet. at 24. Petitioners simply ignore the actual inquiry the Court of Appeals undertook.

The Magistrate recognized that Petitioners had contacts with Illinois on Diamond's and Obie's business, including personal visits, phone calls, and letters. APP. 33a. But the Magistrate thought that these contacts "do not appear to constitute the malpractice of which plaintiffs complain." APP. 34a. Further, the Magistrate thought that the Illinois statute was not satisfied because, as he

read the Complaint, Petitioners had not committed any acts of malpractice in Illinois. APP. 35a.

Petitioners concede that the question whether there is a "nexus" between their Illinois contacts and the cause of action alleged in the Complaint "is a mixed question of law and fact subject to de novo review." Pet. at 24-25; see, e.g., Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982) (district court's findings resting on erroneous view of applicable law are subject to de novo review). Appellate courts are free to

> correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding that is predicated on a misunderstanding of the governing rule of law.

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 (1984).

Here, the Magistrate's and District Court's findings were predicated on a

misunderstanding of the governing long-arm statute. The controlling question is not what Petitioners' Illinois contacts were, but the legal significance of those contacts as measured by the statutory standard.

The Court of Appeals held that the Magistrate (and, by adoption, the District Court) applied an overly rigid interpretation of the Illinois statute. While the Magistrate apparently thought that the cause of action must arise from business actually transacted in Illinois, the Court of Appeals held that "Illinois's long-arm statute '"requires only that the cause of action lie in the wake of the transaction of business [in Illinois]."'" APP. 22a.

Applying this standard, the Court of Appeals found that Petitioners' Illinois contacts easily satisfied the Illinois statute. The essence of Diamond's and

Obie's Complaint was Petitioners' failure to disclose material conflicts and their failure to withdraw as counsel. Petitioners "had an obligation to disclose their conflict of interest when they transacted business or gave legal advice to Diamond and Obie in Illinois." APP. 23a. The Magistrate's "perplex[ing]" treatment of the Complaint simply ignored the cause of action Diamond and Obie alleged. Id.

The Court of Appeals was not bound by either the Magistrate's interpretation of the Illinois long-arm statute or his interpretation of the Complaint.[9/] Neither of these is a factual

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[9/] Contrary to Petitioners' assertion (Pet. at 25-26), the Court of Appeals did not ignore facts and "recit[e] the mere allegations of the complaint." The Complaint's allegations determine the cause of action that must arise from the jurisdictional contacts. The Court of Appeals focused on the Complaint because the Magistrate failed to do so in his treatment of Diamond's and Obie's claims.

determination. The Court of Appeals properly reviewed these matters de novo and applied the undisputed facts.

The record in this action does not present the standard-of-review issue Petitioners wish to assert. Petitioners agree that the Court of Appeals was entitled to undertake de novo review of the intertwined questions of law and fact that determine personal jurisdiction. That is exactly what the Court of Appeals did.

C. Petitioners Present No Colorable Due Process Claim.

Making a brief stab at a constitutional argument, Petitioners assert that their Due Process Clause rights were violated because they had no "fair warning" that their representation of Diamond and Obie might subject them to personal jurisdiction in Illinois. Pet. at 27. This argument has no chance of

success. It runs counter to this Court's well-established due-process jurisprudence, and it presents no novel or important issues warranting a reassessment of this Court's prior decisions.

Petitioners assert that they could, over a five-year period: (1) knowingly represent an Illinois client; (2) knowingly represent a client that made mortgages solely on Illinois real estate and sold investments solely to Illinois investors; (3) knowingly tailor their work product to the Illinois client's Illinois needs; and (4) knowingly transmit their work product to the client in Illinois through letters, phone calls, and personal visits - yet still have no "fair warning" that the client might sue them for malpractice in Illinois. Petitioners' contention is self-refuting, as the Court of Appeals correctly held.

This is not a case like World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), in which the stream of commerce eventually and unforeseeably carried the defendant's product to a far-off state. 444 U.S. at 295-97. Here, the sale of services was directly to Illinois. As this Court observed in World-Wide Volkswagen:

> Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its product into the stream of commerce with the expectation that it will be purchased by consumers in the forum State.

444 U.S. at 297-98 (emphasis added).

Here, Petitioners had more the an

expectation that their "product" - legal services - would be purchased by consumers in Illinois. That was a certainty, since the sale was direct to Diamond and Obie. And, like a car that lacks a critical part, Petitioners' product was defective: it lacked loyalty.

Petitioners not only dealt directly with Diamond and Obie in Illinois, they tailored their product to their Illinois clients' specific needs. While merely placing a product in the stream of commerce does not suffice to connect the producer with a particular forum state, "designing the product for the market in the forum State" adds the necessary connection. Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112 (1987); Mason v. F. LLI Luigi and Franco Dal Maschio Fu G.B. s.n.c, 832 F.2d 383, 386 (7th Cir. 1987); Amoco Cadiz, 699 F.2d at 916 (same). Petitioners had to know that,

if the product was defective, they were likely to be sued in Illinois.

Personal jurisdiction does not depend on technicalities. So long as a defendant has "purposefully directed" its acts toward residents of the forum state, the defendant need never have been physically present in the forum state to be subject to jurisdiction there. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985). The Due Process Clause does not require a "mechanical" tally of visits, letters, or phone calls. Burger King, 471 U.S. at 478.

Petitioners' physical contacts with Diamond and Obie in Illinois are substantial. But even if they were not, this Court's decisions demonstrate that Petitioners' longstanding attorney-client relationship with Diamond and Obie makes the exercise of personal jurisdiction in Illinois both foreseeable and just. This

case supplies neither novel facts nor special considerations of justice that would warrant review.

II.
THE COURT OF APPEALS' DECISION OF THE BANKRUPTCY RULES ISSUE WAS FULLY CONSIDERED AND PRESENTS NO SPECIAL REASONS JUSTIFYING REVIEW.

Though they hyperbolically state that "[i]t is difficult to imagine a more important conflict than the question of personal jurisdiction presented by this case," Pet. at 5, Petitioners point to no conflict with any decision of this Court or of any court of appeals.

Further, Petitioners themselves cite a dozen district court and bankruptcy court decisions fully consistent with the decision below. Pet. at 9 n. 9; id. at 16 n. 14; id. at 17 n. 15. Ignoring the obvious conclusion that the lower courts are consistently getting the issue right,

Petitioners attempt to spin gold from straw by asserting that the "havoc" of these allegedly incorrect decisions "is approaching epidemic proportions." Id. at 16.

Petitioners' approach to certiorari turns this Court's rules on their head. Supreme Court Rule 10.1(a) provides that the hallmarks of a decision meriting review are conflict with a decision of this Court or the decision of another court of appeals, or an extensive departure from the accepted and usual course of judicial proceedings. To the contrary, Petitioners assert that unanimity of lower-court opinion demonstrates "widespread confusion," Pet. at 5, and requires this Court's action.

Rather than stem the tide of correct decisions below, this Court should reserve its certiorari jurisdiction for issues that present important conflicts. As the

following sections show, Petitioners' construction of the Bankruptcy Rules and their enabling statutes is grounded on a misreading of the Rules' language and sows confusion where none exists.

A. The Bankruptcy Rules Apply In "Related To" Proceedings.

Pursuant to authority granted by Congress, 28 U.S.C. § 2075, this Court has promulgated rules of procedure for bankruptcy cases and proceedings (the "Bankruptcy Rules"). Among these is Bankruptcy Rule 7004(d), which provides for nationwide service of process. Petitioners assert that, although the District Court properly had subject-matter jurisdiction under the "related to" prong of the bankruptcy jurisdictional statute, 28 U.S.C. § 1334(b), the Bankruptcy Rules do not apply to any "related to" proceedings, whether they are before a district judge or a bankruptcy judge.

This sweeping nullification of the Bankruptcy Rules finds no support from any court and is dead wrong.

In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), this Court invalidated the portion of the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, that granted to Article I bankruptcy judges the power to decide state-law disputes subject only to appellate review. 458 U.S. at 87 and n. 40. In the wake of Northern Pipeline, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), Pub. L. No. 98-353, 98 Stat. 333, which created the following jurisdictional scheme:

(1) district courts have "original and exclusive jurisdiction of all cases under title 11 [of the United States Code]." 28 U.S.C. § 1334(a);

(2) district courts have "original but not exclusive jurisdiction of all civil proceedings arising

under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b);

(3) district courts may refer "all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11" to bankruptcy judges. 28 U.S.C. § 157(a);

(4) bankruptcy judges may enter final orders, subject only to appellate review, in "core" proceedings. 28 U.S.C. § 157(b)(1); and

(5) bankruptcy judges may "hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11" but may make only recommended findings and conclusions to the district court, subject to de novo review. 28 U.S.C. § 157(c)(1).

Unlike the independent bankruptcy courts created by the 1978 Bankruptcy Code, the bankruptcy judges under BAFJA are "a unit of the district court." 28 U.S.C. § 151. Their jurisdiction is solely derivative of the district courts' jurisdiction. Wasserman v. Immormino (In re Granger Garage, Inc.), No. 89-4022 (6th Cir. Nov.

30, 1990), 1990 U.S. App. LEXIS 20847 at *6-*7.

The 1978 Bankruptcy Code and BAFJA created several significant jurisdictional terms of art. The bankruptcy "case," over which the district courts have exclusive jurisdiction (subject to referral to a bankruptcy judge) includes the whole collection of "proceedings," each one of which in form may resemble a separate lawsuit, that must be adjudicated after a bankruptcy petition is filed. S. Rep. No. 989, 95th Cong., 2d Sess. 153-54, reprinted in 1978 U.S. Code Cong & Admin. News 5787, 5939-40 ("As used in this section, everything that occurs in a bankruptcy case is a proceeding."); 1 Collier on Bankruptcy, ¶ 3.01 at 3-20-21 (15th ed. 1990).

"Proceedings" are of three types: (1) those "arising under title 11," (2) those "arising in . . . a case under title

11," and (3) those "related to a case under title 11." 28 U.S.C. § 1334(b). A proceeding is "related to" a case under title 11 if its outcome "affects the amount of property available for distribution or the allocation of property among creditors." Elscint, Inc. v. First Wisconsin Financial Corp. (In re Xonics, Inc.), 813 F.2d 127, 131 (7th Cir. 1987); accord, Kelly v. Nodine (In re Salem Mortgage Co.), 783 F.2d 626, 634 (6th Cir. 1986); Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984). The District Court had subject-matter jurisdiction under the "related to" prong of 28 U.S.C. § 1334(b) because, although the substantive law governing Diamond's and Obie's cause of action is not supplied by title 11, its outcome will have a significant impact on the distribution to creditors. Petitioners do not contest this. Pet. at 3.

Petitioners argue that none of the Bankruptcy Rules is applicable in proceedings under the "related to" jurisdictional prong of 28 U.S.C. § 1334(b), regardless of whether the proceeding is pending before a district judge or a bankruptcy judge. This represents a change of position. Petitioners argued below that, as the District Court held (APP. 38a), Rule 7004(d) would have applied had this lawsuit been filed with the bankruptcy clerk's office. Nevertheless, Petitioners' new assertion is as incorrect as their old one.

Petitioners' whole argument is based on a misreading of Bankruptcy Rule 1001, which provides:

> The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code.

Petitioners incorrectly equate the phrase "cases under title 11" with the first

prong of 28 U.S.C. § 1334(b), which grants the district courts original but not exclusive jurisdiction over "all civil proceedings arising under title 11." Thus, Petitioners argue, proceedings deriving jurisdiction from § 1334(b)'s third ("related to") prong are excluded from the Bankruptcy Rules' scope.

A "case under title 11" is not the same thing as a "proceeding arising under title 11." As shown above, a "case under title 11" is the umbrella under which all disputes connected with the bankruptcy estate are collected. See 28 U.S.C. § 1334(a) (granting district courts exclusive jurisdiction of "all cases under title 11"). By contrast, a "proceeding arising under title 11" is a proceeding that asserts a cause of action based on some title 11 provision. H.R. Rep. No. 595, 95th Cong., 2d Sess. 445-46, reprinted in 1978 U.S. Code Cong. & Admin.

News 5787, 6401; Carlton v. BAWW, Inc., 751 F.2d 781, 787 (5th Cir. 1985); 1 Collier on Bankruptcy ¶ 3.01 at 3-23-26.

Petitioners' argument founders on their assumption that the phrase "cases under title 11" as used in Bankruptcy Rule 1001 means the same thing as "proceedings arising under title 11" as used in 28 U.S.C. § 1334(b). It doesn't.[10/]

Indeed, if Petitioners' argument were correct, this Court, in promulgating the Bankruptcy Rules, and Congress, in sanctioning them, would have left a huge gap in bankruptcy procedure, because, under Petitioners' argument, even bankruptcy courts cannot apply the

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[10/] By the same token, Petitioners' argument that 28 U.S.C. § 2075 does not authorize rulemaking for "related to" proceedings (Pet. at 9-10) must fail. Section 2075 gives this Court authority to prescribe rules of practice and procedure "in cases under title 11." Again, this does not mean "in proceedings arising under title 11."

Bankruptcy Rules in "related to" proceedings. But the Bankruptcy Courts cannot apply the Federal Rules of Civil Procedure either. See Fed. R. Civ. P. 81(a)(1) ("These rules do not apply to proceedings in bankruptcy"). Thus, according to Petitioners, this Court and Congress have left bankruptcy courts with no rules to govern procedure in the numerous "related to" proceedings that they adjudicate every day.[11/] Petitioners' argument is not only erroneous, it produces an impossible result.

[11/] Petitioners recognize this problem and suggest that the Advisory Committee on Civil Rules needs to make some changes. Pet. at 8 n. 8. But they are apparently the first and only ones to see the need for a change. Only on Petitioners' garbled reading of the statute and the Rule is a change necessary.

B. This Is An "Adversary Proceeding," To Which The Bankruptcy Adversary Rules Apply.

Petitioners' second textual argument is that, even if the Bankruptcy Rules apply to "related to" proceedings, the 7000-series rules apply only to "adversary proceedings," and this is not one. This argument fails because, as the Court of Appeals correctly found, this is an adversary proceeding as defined in the Bankruptcy Rules.

"Adversary proceeding" is another bankruptcy term of art. It is defined as, among other things, a proceeding "to recover money or property . . . ." Bankruptcy Rule 7001(1). This suit is one "to recover money." Petitioners argue (Pet. at 12-13) that this phrase applies only to proceedings to "recover" money that was once part of the estate. This contention has no legal support and is

contrary to common sense. Money is fungible. Only if a suit sought the return of specific coins or dollar bills - which would be of interest only to a numismatist - would the suit be one to "recover money" in the sense Petitioners advance. Yet lawyers and courts, including this Court, regularly speak of "recovering" money damages. See, e.g., Miles v. Apex Marine Corp., 111 S. Ct. 317, 320 (1990) ("recover damages for loss of society"); Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2704 (1990) ("recovery of presumed or punitive damages"); Texaco, Inc. v. Hasbrouck, 110 S. Ct. 2535, 2538 (1990) ("respondents recovered treble damages").[12/]

[12/] It is also obviously nonsense to speak of "recovering" punitive or treble damages in Petitioners' parlance, because the money paid by the defendant was never even notionally the prior property of the plaintiff.

Petitioners frequently assert that this suit is not an adversary proceeding because it is essentially a state-court action that, solely by virtue of Diamond's and Obie's bankruptcy, is proceeding in a federal court. However, Bankruptcy Rule 7001(10) expressly provides that any state-court suit removed to federal court pursuant to 28 U.S.C. § 1452 is an adversary proceeding.[13/] Thus, had this suit originally been commenced in state court, upon its removal to federal court it would by definition be an adversary proceeding. The fact that this suit was commenced in federal court rather than

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13/ Though in non-bankruptcy litigation only a defendant may remove to federal court, 28 U.S.C. § 1441(a), Section 1452 provides that a "party" may remove claims related to bankruptcy cases. Thus, had Diamond and Obie commenced this suit in state court and then filed their bankruptcy petitions, they would have been entitled to remove.

state court does not make it any less an adversary proceeding.

Finally, the Advisory Committee notes to Rule 7001 negate Petitioners' contention. The notes state:

> Proceedings to which the rules in Part VII apply directly include those brought to avoid transfers by the debtor under §§ 544, 545, 547, 548 and 549 of the Code; subject to important exceptions, proceedings to recover money or property . . . .

Sections 544, 545, 547, 548, and 549 of the Bankruptcy Code in a sense apply to the "recovery" of property transferred away by the debtor. But "proceedings to recover money or property" is an independent prong following the semicolon. It does not modify the avoidance of transfers; it adds another category. If Petitioners' interpretation were correct, this separate category would not exist.

Much of Petitioners' argument is devoted to a discussion of "plenary" and "summary" proceedings under the now-

repealed Bankruptcy Act of 1898. But the 1978 Bankruptcy Code eliminated these categories and changed the structure of bankruptcy courts and their jurisdiction. Northern Pipeline, 458 U.S. at 54; see also S. Rep. No. 989, 95th Cong., 2d Sess. 153, reprinted in 1978 U.S. Code Cong. & Admin. News, 5787, 5939 ("[P]roceeding here is used in its broadest sense, and would encompass what are now called contested matters, adversary proceedings, and plenary actions under current bankruptcy law."). Petitioners thus argue from principles and definitions that no longer exist.

C. Applying Nationwide Service Of Process Does Not Offend The Due Process Clause In This Case.

Petitioners' final argument is that the Due Process Clause prohibits assertion of nationwide personal jurisdiction in a "related to" proceeding under 28 U.S.C.

§ 1334(b). Even if there were merit in Petitioners' argument, this case is not a proper test. As noted above (see section I(C)), Petitioners' contacts with the state of Illinois are quite substantial enough to satisfy any reading of the Due Process Clause. Thus, even assuming arguendo that 28 U.S.C. § 1334(b) requires minimum contacts with the forum state, Petitioners have such contacts. This case therefore does not present the question whether a defendant's contacts with the United States alone, as opposed to the forum state, satisfy the Due Process Clause. This Court should not grant certiorari to decide an abstract question where it is inevitable that the Court of Appeals was correct as to the result.

In any event, the Court of Appeals' decision was correct. Relying on an unbroken line of decisions, the Court of Appeals properly held that Congress may

constitutionally provide for nationwide service of process and that it has done so here. APP. 19a-20a; see also United States v. Union Pacific Railroad Co., 98 U.S. 569, 604 (1879) (the Constitution does not prohibit Congress from providing that suits of a special character may be brought in any federal circuit court).

Petitioners argue that their state-created rights should not be altered by the happenstance that their clients have filed bankruptcy petitions. But it is commonplace that state-created rights change in bankruptcy. Secure property rights may be avoided as preferences or fraudulent conveyances. 11 U.S.C. §§ 547, 548(a). Indisputable rights to foreclose or pursue actions against a debtor are stayed. 11 U.S.C. § 362. Perfected security interests in fruits of collateral may be negated. 11 U.S.C. § 552(a).

Nothing in the decision below changes Petitioners' fundamental substantive rights. Whether they are liable for malpractice has not been affected by the "happenstance" of bankruptcy. The only difference potentially created by bankruptcy is the physical location of the trial. This is a much lesser change than the substantive changes wrought by 11 U.S.C. §§ 362, 547, 548(a), and 552 and does not rise to constitutional dimension.

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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EXHIBIT

Illinois Public Act 86-840,
Amending Ill. Rev. Stat. ch. 110, ¶ 2-209

LAWS

OF THE

STATE OF ILLINOIS

EIGHTY-SIXTH GENERAL ASSEMBLY

1989

PUBLIC ACT 86-1
THRU
PUBLIC ACT 86-1027

health centers.

Passed in the General Assembly June 14, 1989.
Approved September 7, 1989.
Effective January 1, 1990.

PUBLIC ACT 86-840
(Senate Bill No. 772)

AN ACT to amend the Code of Civil Procedure, approved August 19, 1981, as amended, by changing Section 2-209.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. The Code of Civil Procedure, approved August 19, 1981, as amended, is amended by changing Section 2-209 as follows:

(Ch. 110, par. 2-209)

Sec. 2-209. Act submitting to jurisdiction - Process.

(a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

(1) The transaction of any business within this State;

(2) The commission of a tortious act within this State;

(3) The ownership, use, or possession of any real estate situated in this State;

(4) Contracting to insure any person, property or risk located within this State at the time of contracting;

(5) With respect to actions of dissolution of marriage, *declaration of invalidity of marriage* and legal separation, the maintenance in this State of a matrimonial domicile at the time this cause of action arose or the commission in this State of any act giving rise to the cause of action;

(6) With respect to actions brought under the Illinois Parentage Act of 1984, as now or hereafter amended, the performance of an act of sexual intercourse within this State during the possible period of conception;~~,~~

(7) The making or performance of any contract or promise substantially connected with this State;

(8) The performance of sexual intercourse within this State which is claimed to have resulted in the conception of a child who resides in this State;

(9) The failure to support a child, spouse or former spouse who has continued to reside in this State since the person either formerly resided with them in this State or directed them to reside in this State;

(10) The acquisition of ownership, possession or control of any asset or thing of value present within this State when ownership, possession or control was acquired;

(11) The breach of any fiduciary duty within this State;

(12) The performance of duties as a director or

officer of a corporation organized under the laws of this State or having its principal place of business within this State;

(13) The ownership of an interest in any trust administered within this State; or

(14) The exercise of powers granted under the authority of this State as a fiduciary.

(b) A court may exercise jurisdiction in any action arising within or without this State against any person who:

(1) Is a natural person present within this State when served;

(2) Is a natural person domiciled or resident within this State when the cause of action arose, the action was commenced, or process was served;

(3) Is a corporation organized under the laws of this State; or

(4) Is a natural person or corporation doing business within this State.

(c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

(d) ~~(b)~~ Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this Section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.

(e) ~~(c)~~ Service of process upon any person who resides or whose business address is outside the United States and who is subject to the jurisdiction of the courts of this State, as provided in this Section, in any action based upon product liability may be made by serving a copy of the summons with a copy of the complaint attached upon the Secretary of State. The summons shall be accompanied by a $5 fee payable to the Secretary of State. The plaintiff shall forthwith mail a copy of the summons, upon which the date of service upon the Secretary is clearly shown, together with a copy of the complaint to the defendant at his or her last known place of residence or business address. Plaintiff shall file with the circuit clerk an affidavit of the plaintiff or his or her attorney stating the last known place of residence or the last known business address of the defendant and a certificate of mailing a copy of the summons and complaint to the defendant at such address as required by this subsection *(e)* ~~(c)~~. The certificate of mailing shall be prima facie evidence that the plaintiff or his or her attorney mailed a copy of the summons and complaint to the defendant as required. Service of the summons shall be deemed to have been made upon the defendant on the date it is served upon the Secretary and shall have the same force and effect as though summons had been personally served upon the defendant within this State.

(f) ~~(d)~~ Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him or her is based upon *subsection (a)* ~~this Section~~.

(g) ~~(e)~~ Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

Section 2. This Act takes effect upon becoming law.

New matter indicated by italics - deletions by strikeout.

Passed in the General Assembly June 28, 1989.
Approved September 7, 1989.
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